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*J. W. W.*  
*W. J. S.*

**REPORTS**  
**OF**  
**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK.**

---

**BY THE**  
**HON. LEWIS H. SANDFORD,**  
**ONE OF THE JUSTICES OF THE COURT.**

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**VOLUME II.**

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**JUSTICES**  
**OF THE**  
**NEW YORK SUPERIOR COURT,**  
**DURING THE TIME OF THESE REPORTS.**

---

**TO MAY 1, 1849 :**

<b>THOMAS J. OAKLEY, CH. J.</b>	<b>}</b>	<b>JUSTICES.</b>
<b>AARON VANDERPOEL,</b>		
<b>LEWIS H. SANDFORD,</b>		

---

**AFTER MAY 1, 1849 :**

<b>THOMAS J. OAKLEY, CH. J.</b>	<b>}</b>	<b>JUSTICES.</b>
<b>AARON VANDERPOEL,*</b>		
<b>LEWIS H. SANDFORD,</b>		
<b>JOHN DUER,</b>		
<b>JOHN L. MASON,</b>		
<b>WILLIAM W. CAMPBELL,</b>		
<b>ELIJAH PAINE,*</b>		

---

**Judge PAINE succeeded Judge VANDERPOEL on the first day January, 1850.**





## P R E F A C E.

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SINCE the publication of the first volume of these reports, an important addition has been made to the superior court. By the "Act for increasing the number of justices in the superior court of the city of New York, and for extending the jurisdiction of that court," passed March 24th, 1849, (Laws of 1849, Ch. 124, page 168;) three justices were added to the court, from the first day of May 1849, so that it is now permanently constituted as a court, with six justices. The same provision was embodied in the Amended Code of Procedure, passed April 11, 1849, and some alteration made as to the transfer of business from the supreme court. (Laws of 1849, Ch. 438, § 40 to 50, page 622.) The act as thus amended, provided for a transfer to this court, from the supreme court, all civil suits at issue on the 11th of April, 1849, which should thereafter be placed on the general or special term calendar of that court in the city of New York, which were in readiness for hearing on questions of law only, or were equity cases. The superior court was clothed with jurisdiction of all such suits, and required to dispose of the same. It was made the special duty of the three justices added to the court by the act of 1849, to devote their time and labors for two years, to the hearing and determination of the transferred causes.

On the 10th of April 1849, Messrs. John Duer, John L. Mason and William W. Campbell, were elected justices of the court, and entered on their duties on the second day of May following.

No change was made in the organization of the terms of the superior court for the transaction of business. The chambers and the special terms (including the calendars both of issues of law under the code and of issues of fact,) continued to be held by one of the justices of the court. The general terms, including those held

for the transferred causes, were held by not less than two nor more than three justices. All appeals from chambers and from special term, were heard by the three justices elected under the old organization. The *practice cases* reported in this volume as being decided by "The Court," were all decided by the justices composing the court under that organization, except where it is otherwise stated in the report.

In pursuance of the provision of the statutes of 1849, four hundred and fifty-four causes have been transferred to this court, from the supreme court. A large proportion of these were suits which had been commenced and were pending in the late court of chancery on the first Monday of July 1847, when the constitution of 1846 went into effect and abolished that court. In this mode, many equity cases, commenced by bill, were subjected to the decision of the superior court.

It will be perceived that the decisions on the merits, reported in this volume, are brought down only to July 1849. Various circumstances not likely again to occur, have prevented its completion at an earlier period. Another volume will appear in a few months ; and it is expected that hereafter, there will be no delay in the publication.

*New York, Dec. 18th, 1850.*

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**Z**



**CASES**  
**ARGUED AND DETERMINED**  
**IN**  
**THE SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK.**

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**JOYCE AND MURPHY v. ADAMS AND HAWTHORN.**

On a sale of cotton by a written contract, deliverable in thirty days, the buyers were to pay storage, insurance, and interest after ten days, and were to deposit with the sellers five dollars per bale. Before the thirty days expired, and before any delivery, or further act to pass the title to the buyers, the cotton was destroyed by fire. When it was burnt, and at the end of the thirty days, the value of cotton in the market, was much below the contract price. In a suit by the buyers to recover back the deposit; *held*, that the true construction and meaning of the contract, was that the deposit was to secure the seller against loss by means of a fall in the price of the cotton, as well as to constitute a part payment on the contract, and that although the title did not pass, the purchaser was entitled to retain the deposit, to make up the deficiency in the contract price, left after the application of the insurance money, which covered the value of the cotton at the time of its destruction.

July 14; July 27, 1848.

THIS was an action of assumpsit, brought to recover back money paid to the defendants, under the following circumstances:—

On the 27th day of January, 1847, T. J. Stewart, a cotton broker, negotiated a sale of cotton by the defendants to the plaintiffs, upon which bought and sold notes were signed by or in behalf of the parties respectively. The following was the sold note delivered to the plaintiffs:—

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Joyce v. Adams.

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"NEW YORK, January 27th, 1847.

*Messrs. Joyce & Murphy,*

Bought of *Messrs. Adams & Hawthorn*, South Street.

259 bales of Cotton, viz., at  $13\frac{1}{2}$  c.

A. P. L. 100  $\square$  bales Charleston, at  $13\frac{1}{2}$  c.

S. Hunt, 64 " " " "

B. B. 95 " " Mobile, "

And buyers to pay seven cents per bale storage.

" " insurance.

" " interest after ten days.

" " deposit five dollars per bale.

Deliverable thirty days from date. Cash on delivery.

THOMAS J. STEWART, *Cotton Broker.*"

The defendants gave a receipt for the deposit, in these words :  
 "Rec'd from Messrs. Joyce & Murphy, twelve hundred and ninety-five dollars, being deposit of \$5 per bale on 259 bales cotton."

The purchase note delivered to the defendants, differed from the preceding in one particular only ; the cotton was to be delivered within thirty days.

The two lots of 100 bales and 64 bales, were destroyed by fire on the 23rd of February, 1847, before the expiration of the thirty days, and the suit was brought to recover the five dollars per bale paid as a deposit on those lots. The residue of the cotton was delivered and accepted, without prejudice to the claims of the parties in respect of the 164 bales ; and the questions in dispute were limited to the latter.

The 164 bales remained in store, subject to the order of the defendant, until it was destroyed. The plaintiffs had procured it to be re-sampled, shortly before the fire, with a view to offer it for sale, and the same broker offered it for sale in their behalf.

The defendants insured the cotton in their own names after the sale, but the insurance on the lot delivered was paid to them by the purchasers, in accordance with the contract of sale ; as was also the storage.

There was a change in the market, between January 27th

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Joyce v. Adams.

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and February 23rd, and the price of cotton generally declined about two cents a pound. The value of the cotton as appraised, for adjusting the loss after the fire, was for the 100 bales, 12½ cents per pound, and for the 64 bales, 13 cents per pound. Evidence of the quantity was given by the weighers who weighed it before the sale to the plaintiffs. The insurance covering only the value, the defendants were left uncovered for the fall in price, except by the deposit in question. They received the insurance money, after this suit was commenced, and offered to return to the plaintiffs the surplus after making themselves whole, according to the terms of the sale. The plaintiffs objected to the testimony offered to show the weight of the cotton which was destroyed. The price of cotton at the end of the thirty days, was no more favorable to the plaintiffs, than it was on the 23rd of February.

It appeared that the 164 bales were stored in such a manner, that any one going to examine them might see nearly all the bales, and the 164 bales sold constituted all of those respective marks which the defendants had in store. The defendants had not procured these two lots to be weighed for the plaintiffs prior to the fire.

Mr. STEWART testified for the plaintiffs, that the course and practice of the trade in effecting a delivery of cotton, is as follows: When the contract matures, the buyer gives an order upon the seller to turn it out. The seller then employs a sworn weigher, of his own selection, and at his own expense, to weigh the cotton, and sends a bill for the price to the buyer, with the weigher's certificate attached—naming parcels, weights and price. The seller is always to weigh the cotton on delivery, and to deliver it in good order. If the bales want ropes, or need mending, he supplies the ropes and has them mended, and he has the ragged parcels of cotton picked off. These are done before weighing.

None of these things had been done in respect of the 164 bales before the fire. On the 2d March, the plaintiffs drew an order on the defendants for the 95 bales, and another for the

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Joyce v. Adams.

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164 bales, offering to pay the price on receipt of the bill of the same.

A verdict was taken for the plaintiffs, subject to the opinion of the court on a case, with leave to either party to turn it into a bill of exceptions or special verdict.

*A. P. Man*, for the plaintiffs.

I. The contract of the 27th January, was entirely executory. It was a mere agreement to sell, and the title did not pass. (*Russell v. Nicoll*, 3 Wen. 112; *Boyd v. Siffkin*, 2 Camp. 328; *Tempest v. Fitzgerald*, 3 B. & Ald. 680.)

II. Where any thing remains to be done, by or on behalf of the vendor, to ascertain the quantity or price, or to put the property in a deliverable state, the sale is not complete, and the property does not pass. (*Rapelye v. Mackie*, 6 Cow. 250; *Ward v. Shaw*, 7 Wend. 406; *Rugg v. Minett*, 11 East, 210; *Hanson v. Meyer*, 6 East, 614; 7 Cow. 87; 2 Kent's Com. 495; Blackburn on Sales, 150 to 152.)

III. There is nothing in the contract to take the case from the general rule of law which throws the risk of loss upon the person in whom the property was vested at the time. (2 Kent's Com. 492; Smith's Merc. Law, 478, note, Ed. of 1847; *Failing v. Baxter*, 6 Barn. & C. 360.)

The object of the deposit was to cover any failure to perform the contract by the purchaser. The only failure here is on the part of the sellers. They could not deliver the cotton.

IV. The defendants bound themselves to deliver the cotton at all hazards, and having failed to do so, the plaintiffs had a right to rescind and recover the deposit. (Chitty on Contracts, 273, and cases there cited; *Hadley v. Clarke*, 8 T. R. 259, 265 to 267; Addison on Contracts, 683 and 712, and cases there cited; Story on Sales, § 424, 448.)

*D. Lord*, for the defendants.

I. The deposit of money was for the purpose of protecting the sellers against a fall of price. The risk of fire they were protected in by the insurance paid by the purchasers. The risk



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Joyce v. Adams.

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of a refusal to accept, they were protected in by the vendor's lien. But both these protections would not cover a fall of price ; and for this the deposit was made.

The sale was not exactly an executory contract of sale. What is the meaning of the contract ? What purpose was the deposit to answer ? The 259 bales were all specified by their marks. So there was a specific subject, and a valid contract in writing for its sale ; and the deposit was not made by way of earnest. The buyers were to pay storage, because all the interest passed, though the property did not. They were to pay insurance, because the real interest passed to them, though technically the property was in the seller. And this shows, also, that the buyers meant to undertake all the risk. They were to pay interest after ten days, making it equivalent to a cash sale ; and the property was deliverable in thirty days, the cash to be paid on delivery. The deposit must answer the gap which is left. The sellers were to be put in entire security. What was the gap ? Not the insolvency of the buyers, because the sellers retained the property ; but it was a depreciation in price. If there were a fire, the insurers would pay only the value of the property ; and it was only by the deposit that the sellers could have entire security. This was just the amount requisite to cover the depreciation.

II. The fall of price having taken place, and the policy against fire, being to the extent of such fall, unavailing, the deposit is properly resorted to by the defendants.

III. The rights of the parties do not depend on the question whether the property passed before the fire. That was fully provided against, by the lien and insurance ; the deposit was intended as an additional security against a fall of price ; which was needed in both parts of the alternative, the safety or loss of the cotton.

The testimony objected to, was properly introduced. The sellers were trustees of the buyers in respect of the insurance. We furnished the best evidence which the nature of the case admitted, as to the quantity and the value of the cotton which was burnt.

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Joyce v. Adams.

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*Man*, in reply. The deposit was made to secure against the inability of the purchasers to complete for any cause ; as by their insolvency, their refusal to take the cotton, and the like. If the money were paid on the contract price, the defendants cannot retain it ; as they were incapable of performing their contract of sale.

BY THE COURT. OAKLEY, CH. J.—In this case there was a sale of cotton by a written contract, deliverable in thirty days, the purchaser depositing at the time, five dollars per bale. The property was to remain in the possession of the seller, at the expense of the purchaser, who was to pay storage and insurance ; and he was also to pay interest on the price after ten days. The property was destroyed by fire within the thirty days, so that there could be no delivery by the seller. The purchaser now sues, on the ground that the contract has failed, and he is entitled to recover back the deposit.

The general principle undoubtedly is, that on a contract of sale, where the title to the goods does not pass, if there be a failure to perform on the part of the seller, the buyer may recover back whatever he has paid on the purchase. But the defendants contend, that although the title to the property did not pass, the actual interest did vest in the plaintiffs, and that the deposit was made to indemnify the defendants against a depreciation in the price.

In this case, the obligation to deliver the cotton was complete by the contract. The purchaser was to pay insurance and storage, and the equitable interest was in him. The property was left with the seller as a security for the payment of the purchase money. The true construction and meaning of the parties, evidently was, that the deposit was to be a part payment of the price and to secure the seller against loss, the property remaining as security also, to the extent of its value.

The insurance money has covered its value, but the price fell in the market, and the sole question is, on whom is to fall the loss in the price.

We can see no other possible motive for the deposit, than to

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Oakley v. Aspinwall.

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secure against this very contingency, where the seller retained the goods, their whole value was covered by insurance, and all was evidently at the risk of the purchaser. We have no doubt that this is the true construction of the contract between the parties; and the defendants are entitled to retain the deposit to make up the contract price of the cotton.

Judgment for the defendants.

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OAKLEY v. ASPINWALL and others.

In a proceeding by way of foreign attachment, for a debt upon which a judgment has been recovered against all the joint debtors, some of whom were not served with process, it is sufficient to describe the debt claimed as being founded on the judgment, without mentioning the original cause of action for which it was recovered; although such cause of action must be proved, to establish the demand against those who were not served.

By the law merchant, recognized by the commercial world, a participation in the uncertain profits of trade, as a return for capital advanced, constitutes such participator a partner in the concern in which the capital is invested, and makes him liable to third persons, though he is to receive back his whole capital and profits, without deduction for losses or liabilities of the concern.

Though it be proved that the law of the country where a contract was made, required all contracts of partnership to be reduced to public documents, and registered, a secret partner of a firm which has not complied with such law, will be held liable to the creditors of the firm, though the contract of co-partnership be void, as between the partners.

Where the accounts current between a house and a person sought to be charged as a secret partner, showed a division of "*profits of certain transactions*" annually, "*as per detailed accounts*" rendered with the accounts current, and the individual sought to be charged had *destroyed* the detailed accounts; it was *held*, that such destruction, and the failure to prove what the "*certain transactions*" were, afforded ground to infer that such profits arose from the general business of the house.

Where a stipulation was entered into between the parties, agreeing that the defendants should waive a commission which they had obtained, with a stay of proceedings, and that the plaintiff should deduct a certain amount from his claim, for certain items, in respect to which the defendants should give no evidence on the trial; that the stipulation was made to avoid expense and delay,

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 Oakley v. Aspinwall.
 

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and that it should not bind the plaintiff as to the deduction, if the defendants should further postpone the trial of the cause beyond the first week in March term, 1846, and the cause was tried in the first week of March term, 1846, and *after a new trial awarded*, the defendants again postponed the trial; it was *held*, that the defendants were precluded from attacking the items in question, and that the plaintiff, relying on the stipulation for such preclusion, was bound to make the deduction stipulated.

A co-partner, after dissolution, may, under the joint debtor act, give a confession of judgment in a suit actually brought against him and his partner, (the latter not being served with process,) which will make the judgment evidence of the amount of the debt, in the same manner as if he had liquidated an account, and let judgment go by default.

The finding of a judge on an issue of fact tried by him, under the Judiciary Act of 1847, a jury being waived, is entitled, on a motion for a new trial, to the same consideration as the verdict of a jury.

Where a person who contracted a debt in his own name, had confessed judgment in a joint suit brought against himself and another sued as his partner, upon whom process had not been served, whereupon judgment had been entered against both, under the joint debtor act, and a suit was brought, founded upon such judgment, which was defended by the party who had not been served; it was *held*, that the debtor who confessed the judgment, was on the ground of interest, not a competent witness for the plaintiff.—Per SANDFORD, J., at Nisi Prius.

An account subscribed by the ostensible partner of a commercial house, and dated while the partnership existed, is not competent evidence against one sought to be charged as a secret partner, to show to what the joint business extended; there being no proof except by its date, that such account was in existence during the continuance of the firm.—Per SANDFORD, J., at Nisi Prius.

Evidence, which was held to prove one a secret partner.

May 22 to 25; July 8, 1848.

THIS was an action of debt on a bond executed by the defendants to the plaintiff, in the penalty of \$44,985 78, dated January 10, 1838. The bond recited that one of the defendants, as agent of John W. Baker, had applied to discharge a warrant of attachment, by virtue of which the sheriff of New York had attached the property of John W. Baker and John Young, at the instance of the plaintiff; and its condition was, that the obligors should pay to the attaching creditor the *amount justly* due and owing by Baker and Young to him, on account of the debt claimed and sworn to by the plaintiff, with interest, and the expenses of the attachment.

The declaration assigned as a breach of the bond, the non-

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payment of a judgment in favor of the plaintiff against Young and Baker, in the supreme court for \$22,492 98, recovered October —, 1834, in an action of assumpsit. The defendants pleaded, among other things, *nul tiel record* as to the judgment; that Baker was not served with process, and did not appear in the suit, and the promises on which the judgment was recovered were the promises of Young alone, and not of Young and Baker jointly; and that Baker was not indebted to the plaintiff in the sum claimed, or in any other sum. The plaintiff replied, that the promises were those of Young and Baker.

The cause came on to be tried on the 13th day of October, 1847, before Sandford, J., without a jury.

After introducing the bond, the plaintiff offered in evidence the record of the judgment described in the declaration, from which it appeared that the suit was commenced by capias issued out of the supreme court to the sheriff of New York, who returned that the writ was personally served on Young, and that Baker could not be found. The record also showed, that Young alone appeared, and that he gave a *cognovit actionem* for the amount which was recovered. The defendants counsel objected to this evidence as incompetent to sustain the suit.

The plaintiff then gave evidence in order to show that Baker was a resident of Trinidad de Cuba; that in 1828 and 1829, the plaintiff had consigned goods to a large amount to John Young, who was transacting a commission business in his own name at Trinidad. That Young failed in 1833, at which time the balance due to the plaintiff from his house, was the amount for which the judgment in question was recovered; and that during the whole period of these transactions, Baker was the secret partner of Young in his commission business.

The great question of fact litigated in the suit, was the existence of this alleged partnership, and a voluminous mass of evidence was given upon the point.

So far as is important to the case as reported, the proof will be found stated in Judge Sandford's decision at the trial.

A part of the testimony introduced by the plaintiff, consisted of certain accounts current produced by the defendants under

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an order for a discovery ; rendered by Young to Baker every year from 1828 to 1831 inclusive, and by Baker to Young annually from 1827 to 1833 inclusive. In the account for 1832, furnished by Baker to Young, under date of December, was the following item charged to Young, viz. ; "To one-half of the profits resulting from certain operations which have been made for account of both, \$2014 5½."

The plaintiff offered in evidence the deposition of Young, taken conditionally in the cause, on a temporary visit of his to the United States, in order to prove that Baker participated in all the profits of his business at Trinidad in 1828 and 1829. It was proved that Young was dead. His deposition was objected to on the ground that he was interested in the event of the suit. The plaintiff also offered to read a paper in Young's handwriting, appearing to be a letter press copy of an account with Baker for 1832, corresponding in its result with the sum stated in Baker's account rendered to Young for that year, as above quoted. This was objected to by the defendants counsel, as inadmissible.

SANDFORD, J., in respect of these two instruments of evidence, ruled as follows : 1. In reference to the competency of John Young as a witness. The plaintiff claims that he has already established by evidence in Baker's possession, which would be conclusive against Young, that if there were a partnership between them in 1828 and 1829, it was one by which Baker was to receive half the profits, and was entitled to a return of his whole capital advanced, without any diminution, however disastrous the business may have proved.

If the question were open, I should say, as Bronson, J., did in *Pierce v. Kearney*, that it would be difficult to reject this witness on the ground of interest in favor of the plaintiff. The debt was fixed upon Young by the judgment ; and if by this suit, the plaintiff should collect the same debt out of the defendants, (which is the same thing as collecting it from Baker ;) the latter, on the theory upon which the plaintiff seeks to charge him in respect of the nature of his interest in Young's opera-



tions, would be entitled in equity, to enforce the original judgment against Young. And the defendants, as Baker's sureties, would have the same equity as their principal was entitled to, on their advancing for him the amount of the judgment. But I am not at liberty to follow out this argument. The decisions of the supreme court in *Marquand v. Webb*, (16 Johns. 89,) and *Pierce v. Kearney*, (5 Hill, 82,) are conclusive in my view of the case; and the deposition of Young must be excluded.(a)

2. Accompanying this deposition, is a manuscript proved to be in the handwriting of Young, and apparently a letter press copy, entitled "Result of Operations in 1832;" and crediting Mr. Baker in conclusion for half the balance thereby struck, being the precise sum which it appears by his accounts, he charged to Young for half of the profits resulting from certain operations made on account of both. The entry in Baker's accounts is at the close of 1832; and the paper offered in evidence bears date at Trinidad de Cuba, 31st December, 1832, and is signed by Young. The testimony shows that this document was delivered by Young to the plaintiff's attorney, when the judgment was confessed, in October, 1834. Aside from the evidence of Young, which is excluded, the plaintiff relied upon the coincidence between the balance on the manuscript, and that contained in Baker's accounts, as establishing its authenticity beyond a doubt. It was said, that Young could not have fabricated it in 1834, in this city, when all his books and papers were in the bankrupt court in Cuba; and that if such a contrivance had been resorted to, the account for 1828 or 1829 would have been selected, instead of that of 1832, which was three years after the plaintiff's dealings with Young.

The great difficulty in the way of admitting the testimony, is that there is no proof that the document was in existence in 1832. Under the circumstances of this case, I do not feel warranted in holding from the date of the instrument, that it was made at that time. Without this presumption in its favor, the

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(a) See *Hills v. Nash*, before the Master of the Rolls, 11 London Jurist R. 741.

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coincidence in the amount of the balance credited to Baker, is of little moment. It was an easy matter to make a statement and force a balance of any given sum ; and the paper may have been made after Young's failure, prior to his visit to this country in 1834. It is not necessary to impute any fabrication or fraud to Young. I may even believe, as an individual acting daily on what the law rejects as hearsay evidence, that the document is all that it purports to be ; but as a judge, who must reject all testimony not legally competent, I cannot shut my eyes to the consideration, that there is great and obvious liability to fraud, in a document like this. I think that it cannot be received as evidence in the cause.

The plaintiff then gave in evidence, a translation of portions of the tenth chapter of the Ordinances of Bilbao, promulgated by the King of Spain in 1737 ; and of sundry articles of the Code of Commerce, promulgated by like authority in May, 1839 ; and that the latter applied to all the Spanish dominions. The former prescribed, that all partnerships should be formed by a public instrument before a notary, specifying the terms agreed upon, as well as the capital and term of the co-partnership.

The Code of Commerce contained similar provisions, and article 28 declared that an instrument of partnership not registered, should be of no effect between the parties to demand any rights under the same, without rendering it ineffectual in favor of third parties interested. It ordained three kinds of partnership ; the *collective* being similar to our general partnership in the liabilities incurred.

The plaintiff then proved by his attorney in the suit against Young and Baker, that Young was in the city of New York in 1834, and was served with the *capias* issued in that suit. Being cross-examined, he said that the *cognovit* was signed in his office by Young, after the witness exhibited the plaintiff's accounts current to Young. He did not know that a judgment was to be given, till Young came to his office. He was expected to arrive here, and witness had been instructed to sue him when

he came. After he arrived, witness was informed he alleged Baker had been a partner, and the plaintiff instructed him to proceed against both Young and Baker. Before that, Young had commenced two suits against the plaintiff, both in 1831. One was in assumpsit, in which judgment went against Young for not going to trial. The other was for a malicious prosecution in relation to a foreign attachment by the plaintiff. This suit was ended by a *non pros* for not declaring.

The plaintiff then read in evidence the petition and affidavits on which the attachment issued against Baker and Young, on which the bond in suit was given. The petition stated, that Baker resided in Cuba, and Young in Mexico, against whom the plaintiff had a demand for \$22,492 89, arising upon a judgment rendered in the supreme court against Young and Baker in favor of the plaintiff. The affidavit set forth, that B. and Y. were justly indebted to the plaintiff in the sum above stated, *arising upon a certain judgment rendered in the supreme court against Baker and Young, in favor of the plaintiff.*

The plaintiff then rested his cause.

The defendants counsel moved for a nonsuit, on several grounds, which are noticed in the judge's decision at the trial. The motion for a nonsuit was denied.

The defendants read in evidence the depositions of three witnesses, taken at Trinidad de Cuba, tending to show that there was no partnership between Baker and Young; and called as a witness the liquidator in bankruptcy in Cuba of John Young's accounts, who testified to the entries in his books, and in respect of his letters and papers, which it was insisted, showed there was no such partnership.

Similar evidence was given by another witness who made up the accounts furnished by Baker to Young, and stated that they were made up from detailed accounts rendered by Young to Baker. Also, that Baker, not considering that those detailed accounts were of any consequence, or might be interesting at a future day, and having Young's accounts to show the amount due, never preserved any of the detailed accounts.

The defendants then gave in evidence a stipulation, dated

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February 19th, 1846, entitled in this suit, and signed by the plaintiff and by the attorneys for both parties, in these words :

“The plaintiff having brought this cause on, ready for trial at the present February term of this court, under stipulation to try at said term, and the defendants having, at the commencement of said term, moved for a commission to examine a witness at Trinidad de Cuba, which motion has been granted, with a stay of proceedings till the return of said commission ; it is hereby agreed between the attorneys of the respective parties, that the plaintiff shall deduct from the amount of the judgment in his favor against Young and Baker, as of the time of its confession, on the assessment of damages, under the breaches assigned, the sum of nine thousand six hundred and eighty-seven dollars and fifty-nine cents, but without prejudice to his claim on the judgment in any other suit ; and that the defendants waive the order for the said commission ; that the defendants shall not give any evidence on the trial to show any error or alleged fraud on the part of the plaintiff, in stating an account and taking said judgment, so far as respects the allowance or disallowance of any sum or sums, item or items, in respect to the seizure, condemnation, redemption or restoration, of the ship *Marmion* or her cargo, on her second voyage to Trinidad de Cuba, in 1828, it being understood, that said deduction is not to be applied to any other items ; that this stipulation is made by way of compromise, for the purpose of avoiding expense and delay, and is not to affect or prejudice either party in respect to the question of copartnership, or the correctness or incorrectness, or *bona fides* or *mala fides* of the liquidation of the account and confession of judgment by Young ; and that this stipulation, as to deduction, shall not bind the plaintiff if the defendants shall further postpone the trial of this cause beyond the first week in March term, 1846 ; and the plaintiff hereby stipulates to bring said cause to trial at the said March term.”

The defendants counsel then called a witness, and proposed to go into proof touching the seizure and condemnation of the

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Marmion and her cargo, on her second voyage in 1828; and that the balance of account claimed by the plaintiff in 1834, and recovered by him in the judgment against Young and Baker, included the Marmion and her cargo on that voyage. The plaintiff's counsel objected to any inquiry relating to the Marmion or her cargo, as a violation of the stipulation above set forth; and the counsel for the defendant yielded the point.

The plaintiff's counsel also admitted, that this cause was tried in the first week of March term, 1846, and a verdict was found for the defendants, which was set aside for errors of the judge on the trial; and the counsel for the defendants admitted that a new trial having been ordered, the defendants in March term, 1847, moved to put off the trial, on the ground of the absence of a material witness, which motion was opposed, on the ground that it involved a violation of the stipulation of the 19th of February, 1846, but was granted; and at April term again postponed the trial till May term, on the same ground. That after the order to postpone, the witness appeared on the same day, whereupon the plaintiff moved to restore the cause to the calendar, and try it at that term; that the defendants opposed the motion, on the ground of wanting time to translate the documents which the witness brought with him from Trinidad, and the motion was denied; that in May term, 1847, the cause was passed without the fault of either party; that in June term, 1847, the cause was again tried; that the jury did not agree; that in July term, 1847, the trial was again postponed by defendants, on the ground of the sickness of one of their counsel, and the refusal of the other counsel, who had assisted on a former trial, to try it alone, after an unsuccessful motion to obtain a commission to examine John W. Baker, at Trinidad, to prove the destruction of the detailed accounts.

The testimony here closed on both sides, and the counsel for the defendants requested the judge to rule,

1st. That the record of the judgment referred to in the declaration in this cause, was not competent evidence.

2d. That the plaintiff had not proved such a demand against

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Baker as was claimed by the plaintiff in his petition for the attachment upon which the bond in suit was executed.

3d. That the evidence showed that there was no jurisdiction in the officer who issued the attachment, and that therefore, the bond was void.

4th. That the evidence showed collusion between Young and Oakley in the confession of the judgment, which was therefore void as against Baker.

5th. That the statute relative to joint debtors, was never intended to give any effect to a judgment by confession against the individual property of a party not served with process ; and the attachment against Young and Baker, so far as it related to the individual property of Baker, was unauthorised by law, and void, and that therefore, the bond of defendants was void.

6th. That the evidence did not establish a partnership between Young and Baker.

7th. That if the plaintiff were entitled to recover any thing in this suit, the deduction provided for in the stipulation of the 19th of February, 1846, must be made ; and that the plaintiff was not entitled to recover for the cargo of the *Marmion*, seized and confiscated by the Spanish authorities.

SANDFORD, J., on giving judgment, delivered the following opinion and decision :

Several of the points, relied upon as entitling the defendants to judgment, were embraced in their motion for a nonsuit. Thus, 1. It was contended that the plaintiff had not proved all the averments in his declaration. One of the most important, said to be defectively proved, was the existence of such a demand against Baker, as was claimed by the plaintiff in his petition for the attachment, upon which the bond in suit was executed.

In that petition, the plaintiff alleged that he had a demand against Baker and Young for \$22,492 89, arising upon a judgment, rendered in the supreme court of this state, against them in favor of the plaintiff. The judgment produced in evidence

appears to have been rendered against them as joint debtors, Young alone having been served with process.

This, it is insisted, does not prove such a demand against Baker, as is stated in the petition for the attachment, and recited in the bond; and that the supplementary testimony, introduced to establish Baker's liability for the debt upon which the judgment was entered, is inadmissible to sustain the averment in the declaration now under consideration.

As to the latter point, the defendants are undoubtedly correct, in holding that the plaintiff cannot recover on this bond, on the mere proof of an open demand upon contract against Young and Baker, or against Baker only. But I think they err in their view of the effect of the judgment recovered. Our statute declares, that in an action against joint debtors, where the process has been served upon one or more of the defendants, but not upon all, the judgment, if rendered in favor of the plaintiff, *shall be against all the defendants, in the same manner as if all had been served with process.* (2 R. S. 377, § 1.) The effect of the judgment is then regulated, of which I will speak presently.

One consequence of the recovery of such a judgment, most clearly is to merge and extinguish the original debt upon which the suit is brought. If all the defendants had been served with process, the judgment would indisputably merge the debt. The statute says the judgment, in a case like this, shall be rendered against all, *in the same manner* as if all had been served. It cannot be so rendered, if as against some of the debtors, the original demand is open and subsisting, while against others it is extinguished. It is well settled, that the plaintiff in a suit upon such a judgment, must declare in debt upon the judgment, and cannot declare upon his original cause of action. (*Townsend v. Carman*, 6 Cow. 695; S. C. in error, 6 Wend. 206; *Mervin v. Kumbel*, 23 Wend. 293.) The revised statutes, in providing that in a suit upon the judgment it shall only be evidence of the extent of the liability of those not served with process, after their liability had been established by other proof, merely enacted what had been settled law, under the provisions



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of the revised laws of 1813. (See the opinions delivered in *Townsend v. Carman*, before cited.) And the case of *Mervin v. Kumbel*, in which Judge Bronson expressed his doubts as to bringing a suit upon the judgment, is an authority that such a suit may be brought, and it moreover shows that no injustice can arise from proceeding on the judgment, because the defendant who was not served with process, may, by the simple plea of *nul tiel record*, compel the plaintiff to prove his original liability.

Therefore, in 1837, when the plaintiff applied for an attachment against Baker, his demand against Baker and Young, (if he ever had any,) was a *judgment* against them. He could not legally describe it as any thing but a judgment. If he had claimed for a balance due to him on consignments, the production of this record of judgment would have been a conclusive answer to his claim, and avoided his proceedings.

But it was urged, conceding that the judgment merged the debt, that Baker was thereby discharged to all intents, unless in a suit directly upon the judgment itself. In other words, that for the purposes of a proceeding under the act relative to non-resident debtors, the plaintiff had no demand against Baker. His debt was merged in the judgment, and the judgment was unavailable to him for any purpose, except for an execution against joint property, and for a suit directly upon it.

The same course of argument was presented to the court of last resort in *Carman v. Townsend*, and was rejected as unsound. It is sufficient for me to say, that in accordance with the spirit of the decisions on the statute relative to joint debtors, the plaintiff has a demand resting in judgment against Baker as well as against Young, upon which he may proceed *as a judgment*, for any of the remedies which our laws give to creditors, with the qualification, that he must prove the original indebtedness against Baker, if its existence be traversed by him, or in his behalf. And further, that the plaintiff cannot proceed upon his demand, otherwise than as a judgment. If the plaintiff therefore prove that he had a debt against Baker and Young, such as his judgment included, he will sustain the



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avermment in his declaration, that the sum claimed in his petition was due to him on a judgment in his favor against Baker and Young.

2. It was further objected, that the plaintiff had failed to prove jurisdiction in the officer who issued the attachment, and that therefore the bond was void, and the defendants are not liable.

Without adverting to the objection made upon the pleadings to the defendants raising this question, I will consider it as if it were unequivocally presented. The point is, that the plaintiff had no demand against Baker, upon which, as the law was in 1837, he could obtain an attachment against Baker's property. The statute gives the remedy to any creditor "having a demand against the non-resident debtor *personally*, whether liquidated or not, arising upon contract, or upon a judgment rendered within this state," &c. (2 R. S. 3, § 3.) It is argued, that the plaintiff's judgment is not a demand against Baker personally, because it can be enforced by execution only against the joint property of Young and Baker.

The word *personally* was used in this act to distinguish from demands which were against debtors in a representative capacity, as executors and administrators. (*In the matter of Hurd*, 9 Wend. 465.) It has no reference to the state or condition of the demand itself; that is, whether it be a debt due or to become due, in simple contract, in bond, or in judgment. And it is impossible for me to perceive why a demand on a judgment, which by means of a suit and appropriate evidence, may be enforced against the individual property of the debtor, is not as much a demand against him *personally*, as one upon his bond or promissory note.

The affidavit upon which the attachment issued, in my view, therefore, set forth the plaintiff's demand correctly, both in form and in fact, and it is unnecessary for me to examine the case of *Kanouse v. Dormedy*, decided in the court for the correction of errors, in December last,<sup>(a)</sup> which was cited to show

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(a) Now reported in 3 Denio, 567.

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that the defendants, in a suit upon the bond, could not inquire into the jurisdiction of the officer who issued the attachment.

3. Another ground, arising upon the merits of the case, was urged in support of the motion for a nonsuit. The judgment in question was entered upon a confession signed by Young, after the suit was commenced by the issuing and service of a *capias ad respondendum*. It appeared in evidence, that, in 1831, Young refused to settle, and even to examine the accounts with the plaintiff's agent, who went to Cuba for the purpose, and he commenced two suits here against the plaintiff, one in *assumpsit*, and the other for a malicious prosecution, founded on the plaintiff's having proceeded against him as an absent-debtor. Then, in 1834, on his arriving here, and being sued by the plaintiff, he at once confessed judgment for the balance claimed.

On the other hand, it is to be observed that the seizure and confiscation of the *Marmion* on the second consignment made to Young, was the occasion of great difficulty and embarrassment to him, and of a heavy loss to be borne either by him or the plaintiff. In the balance claimed by the latter, this loss was cast upon Young; and there is no reason to doubt that the serious question between them, in respect of this loss, was the cause of the refusal of Young to settle with the plaintiff's agent in 1831, and of the suits commenced by him in that year. Those suits were driven out of court, for want of prosecution, in October, 1833. The testimony of A. V. Pfister, the supercargo, established, at least presumptively, the existence of the plaintiff's demand against Young, to the extent of the balance for which the judgment was confessed, including the *Marmion's* second cargo. The stipulation between the parties precludes the defendants from objecting to the fairness of the judgment, on account of the amount included for that cargo.

The defendants insisted that the circumstances in evidence proved collusion between Young and Oakley, in the confession of the judgment, and that the statute relative to joint debtors, was never intended to give any effect to a judgment by confession, against the individual property of a party not served with process.

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My opinion is clear, that there is not sufficient evidence in the case to warrant me in believing that there was any collusion in the confession of the judgment. As to the point of law, the statute is not restricted to any particular mode of recovery. It does not require that the suit shall have been contested by the party who was served with process. And I have no right in construing it, to say that a judgment by *nil dicit* is within its spirit and intent, and that a judgment by *cognovit actionem* is not.

If Young and Baker were really partners, (which the plaintiff must prove, to maintain this suit.) Young, in 1834, had undoubted authority to settle the partnership accounts with the plaintiff, and strike a balance. (*Bridge v. Gray*, 14 Pick. 55.) And it was obviously indifferent to Baker, whether after Young settled the balance, he should suffer judgment by default, and have that balance proved before a sheriff's jury, or should sign a confession for the amount. The case of *Pardee v. Haynes*, (10 Wend. 630,) and the opinion of the court in *Crane v. French*, (1 Ibid. 311,) fully sustain my conclusion as to the validity of the judgment.

The great question in the cause remains; Was Mr. Baker liable as a joint contractor with Young for the plaintiff's debt? By the law of this state, and, as I understand it, by the law merchant recognized and acted upon throughout the commercial world, a participation in the uncertain profits of trade, renders one a copartner in respect of the liabilities of the concern to third persons. And when money is advanced to a merchant, and the premium or profit for its use is not fixed and certain, but is dependent upon the accidents of trade, the person making the advance will be liable, as a partner, to such merchant's creditors, although he is not to risk any part of his advance, or share in the losses of the trade.

There are exceptions to this rule in many countries, but they are to be found in the enactments of statutes and codes. Such are the special or limited partnerships in this state, the partnership *en commandite* and anonymous, allowed by the Code of Commerce in France, and the similar special partnerships, *en la*

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*commandita* and anonymous, for which provision is made in the *Codigo de Comercio* of Spain. In respect of these limited partnerships, the laws of the countries authorizing them, require the observance of certain forms and acts of publication and registry, to make them complete. The Spanish code requires similar acts in the formation of general partnerships. It does not, however, appear, by the testimony before me, that there was any law in force in Cuba, requiring the observance of these acts, when the partnership is alleged to have been entered into between Baker and Young; or until May, 1829, when the *Codigo de Comercio* was promulgated, in Spain. The *Ordinanzas de Bilbao*, ordained in 1737, so far as the fact is proved, were local in their operation; and I have no historical information that they extended beyond the province of Biscay, and the adjacent regions of Old Castile and New Leon.

If it had been shown that the laws of Cuba in 1828, were the same as they appear to have been after May, 1829, it would not have affected the question in issue. A violation of the regulations prescribed, would have been visited upon the offending partners, and not upon merchants trading with them. Thus, by the 28th article of the *Codigo*, if the partners neglect to register the instrument of partnership, it shall be of no effect *between the parties thereto*, to demand any rights under it; but it shall not thereby be rendered ineffectual in favor of third parties, who may have contracted with the partnerships. (The same rule prevails in France. Code of Commerce, Art. 39 to 44.) So in our special partnerships, the failure to comply with the statutes, instead of absolving the special partner, renders him liable, as a general partner, for the engagements of the house.

In *Shaw v. Harvey*, (1 M. & Malk. 526,) two persons were the petitioning creditors in a bankrupt proceeding, alleging themselves to be partners in trade at Rotterdam, in the kingdom of Holland. The point became material on the trial; and, in answer to the proof of partnership given by the plaintiff, the defendants proposed to show that the petitioning creditors were not legally partners according to the laws of Holland. That

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certain formalities in constituting a partnership, by writing and registering the writings duly executed, were necessary; and that these formalities were not complied with. A copy of the Code Napoleon, proved to be the law of Holland as to the Code of Commerce, was put in by the defendants. Lord Tenterden, Chief Justice, after referring to the articles cited from the Code, said, this may be the governing law of Holland, but it will not prevent persons from suing here as partners. If they really are such, they may maintain an action for goods sold and delivered here. These are merely municipal regulations, preventing, as it seems, their suing as partners where they are in force, but not affecting the general rights of the parties.

Such being the law, the liability of Mr. Baker does not depend upon proof of the formation of a registered partnership, or of any written instrument. If the plaintiff has shown by the evidence, that Baker participated in the profits of the commission business conducted by Young, at the city and port of Trinidad de Cuba, when Young received the plaintiff's consignments, the law merchant fixes upon him the liability of a partner, in respect of those consignments. The case is then narrowed to the simple question, *whether Mr. Baker did or did not participate in those profits at the time designated?* This, of course, must be determined by the evidence.

It appears that, prior to 1828, Young was transacting business as a commission merchant at Casilda, the port of Trinidad de Cuba, and also in the city of Trinidad, and he had had dealings of various kinds with Mr. Baker, by means of which he was Baker's debtor in the sum of \$1,336 2½, at the close of the year 1827. One of these transactions was a speculation in a cargo of boards, for which Baker advanced over \$3,000 to Young in April, 1827, and he was credited in December with \$492 3½, half the profits on the adventure.

In January, 1828, Young became the partner of Hector Kennedy, in the same commercial business. Mr. Baker furnished \$5000 to Kennedy, which was entered by him in his accounts as a loan to K., and constituting K.'s capital. The balance due from Young, formed a part of this \$5000. Kennedy died in

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April, or early in May, 1828; but, in the meantime, Baker's accounts with Kennedy and Young had so far extended, that there was a balance due to him of \$12,384 3, including the loan for K.'s capital. With a trifling exception, the charges against the firm were for sugar and molasses furnished by Baker.

Young continued the business in his own name from Kennedy's death until his failure in the fall of 1833. The first consignment of the plaintiff was made in February, 1828, and nearly the whole cargo remained in Young's hands after the death of Kennedy. The second cargo was consigned to Young in May, 1828, the third at the close of the year, and the last in the spring of 1829.

After Kennedy's death, besides the usual business of a commission merchant, Young was engaged in various subsidiary and collateral adventures in shipments and merchandize, and in two speculations in real estate. Mr. Baker continued to advance to Young large sums in money, and valuable invoices of property. He appears to have been a man of very extensive means, and enjoying a high pecuniary as well as personal reputation. During the era of the plaintiff's shipments, he was in habits of close business intimacy with Young, visiting Young's counting-room very often, examining his books, and advising about his affairs, and Young was often at Mr. Baker's house.

From the accounts produced by Baker, it appears, that as often as once a year, Young rendered to him detailed accounts of transactions between them. The accounts produced, made up by Baker against Young, contain charges for the moneys advanced, and the property delivered by Baker to Young, and sundry small items of debit, and charges for the gains on several adventures, which are designated; and in every instance, down to the close of the year 1832, there is at the end of each periodical account, a charge slightly varying in its phraseology in different years, but substantially in these words:

"To one half of the profits coming to me from certain transactions in which Young interested me, the net proceeds amounting to \$———," (the sum stated,) and referring, in several

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instances, to a liquidation or detailed account of the same, furnished to him by Young. The sums charged to Young for these profits, range from \$2,015 5½ to \$2,344 4, in the five periodical balances to which my observation applies.

A series of balance sheets, or summaries of accounts, rendered by Young to Baker, corresponding with those entered by Baker, for each stated period, to the close of 1831, were produced by Baker, under the orders for discovery. The subsequent account rendered for 1832, was not produced. To the credit of Young in these accounts current, appear the supplies of various kinds for Mr. Baker's plantation, and other matters of private account, as well as moneys paid and other charges.

Among the designated adventures, for the profits on which Young was charged in Baker's accounts, after May, 1828, were a cargo of boards per brig *Angela*, on which Baker's share of the net proceeds was \$1,682 4½; and the cargo of the schooner *Good Intent*, his share being \$3,456 3½; both in 1831. And Young was credited in January, 1829, with \$4,020 4, for his share of the proceeds of the cargo of molasses and sugar sent to New York by the ship *Marmion*, there having been charged to him in account under a prior date, the invoice price of the molasses and sugar, and the expenses on shipping the same.

In 1833, after Baker announced his intention to withdraw his funds at the end of the year, a special shipment appears to have been conducted by Young, but in Baker's name throughout, for which Young is credited in account.

In all these accounts, there is no charge made for interest on the heavy advances of Mr. Baker; and the only apparent return made or expected for the use of his funds, is in the profits entered to his credit or for his benefit.

The plaintiff insists that the entries on balancing these accounts, charging Young with profits, are evidence under the circumstances that Baker participated in the profits of Young's general mercantile business. On the other hand, it is urged that the entries refer to insulated speculations or adventures, such as the cargoes of boards; and that the severe, and in Cuba, the penal consequences of a secret partnership, ought



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not to be visited on Mr. Baker, upon such slight testimony as this.

The burthen of proof is upon the plaintiff, and he should be held to more ample testimony, for the reason that in these consignments which he made, he gave credit to Young alone. Having this in view, how does the evidence stand?

Here are entries made by Mr. Baker himself, showing a regular interest in the profits of certain transactions of Young, continuing for a period of five years. During all that time, Young's regular business was that of a commission merchant. There is no evidence that he was engaged in other transactions to any considerable extent, save those designated in the accounts produced. Indeed, I do not remember but one, (independent of his house in town, and his purchase of land from Mr. Baker, at Casilda,) which is not specially entered, and the profits charged in Mr. Baker's accounts. During the whole period, Baker was advancing money and valuable plantation produce to Young, without any charge for interest, and he was advising him in business, a frequent inmate of his counting-room, and frequently inspecting his books of account. What were these "*certain transactions*" of Young, from which Baker was deriving a constant profit, unless they were his mercantile transactions? If they were not, was it not incumbent on Baker to have proved the fact by the production of Young's detailed accounts furnished to him; or by the books of Young containing all his business operations? Baker was apprised as long ago as 1837, that this plaintiff was attempting to charge him as the secret partner of Young. His letters in 1833, to which I will presently refer, show that he understood perfectly well, that the books and papers of Young would be resorted to for proof of this partnership; and this assurance was made doubly sure by the plaintiff's applications in this suit for a discovery of the accounts and correspondence in Baker's possession. Why then did he not produce Young's books and detailed accounts, to explain the hidden meaning of the entries of the profits in his own accounts?

It is answered, that the detailed accounts were destroyed



after Baker had established his demand in the bankrupt court at Trinidad. The reason assigned is, that he no longer considered them of any consequence. The documents before me show that Mr. Baker is a man of business, of abundant intelligence, very exact and methodical in his transactions; and it is difficult to avoid an unfavorable inference from an act so unusual as the destruction of the accounts rendered of extensive operations of a mercantile character, within a year after they closed. (1 Greenleaf Ev., § 37.) But where are the books of Young? The testimony shows, that on his failure, all his books and papers were seized, and remained from thenceforth in the custody of the court of bankruptcy. They are at Mr. Baker's place of residence, and he might, by a commission, or otherwise, have produced on the trial, conclusive evidence from those books and papers, showing to what transactions Young's detailed accounts crediting him with these profits, actually referred.

It is said, that a resort to these documents was equally open to the plaintiff, and his possession of some original letters of Baker to Young, shows that he might have produced more testimony of the same character, if it would have answered his purpose.

To this it may be answered, that the production of two or three letters, is not any warrant for me to believe that the plaintiff could have abstracted from the files of the bankrupt court, in Cuba, all the documents that he thought proper. Nor is it so clear, that a resident of New York can obtain evidence from the records of a civil law tribunal under the Spanish government, to use against a Spaniard, resident at the place where they are kept, with the same facility, that the latter might obtain it if he thought proper. But it is sufficient to say, that the plaintiff, after proving the entries under consideration, had a right to rely on the inferences which result from them, and to call on the adverse party to rebut those inferences, if the facts would enable him to overcome their force. (See *Whitney v. Sterling*, 14 Johns. 215; 1 Greenleaf Ev. § 78 to 80; *Thommon v. Kalbach*, 12 Serg. & R. 238.)

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Has Mr. Baker produced evidence which repels the inference drawn from the entries in his accounts? or has he explained those entries satisfactorily? Instead of exhibiting to the court Young's books and papers, he has called three witnesses, residents of Trinidad, and two of them intimate with Young, who testify in effect, that they knew nothing of any partnership between Young and Baker. This testimony, wholly negative in its character, is not such as the case demanded from Baker, and is of very little weight. When the witnesses testified so positively, that no person was interested with Young in his business, or in business transactions with him after Kennedy's death, they proved at least that they really knew very little about the affairs of Young; for, Baker's frequent interest in large special transactions of Young, is not merely unquestioned, but is made the basis of the defendant's explanation of the entry of profits, at the end of each balance-sheet of Baker's accounts.

The testimony of Mr. De Zaldo is equally indecisive; we have here, all that he is positive that he compared or examined in the bankrupt proceedings.

The desperate circumstances of Young, and the improbability that Baker would involve himself as a partner with a bankrupt merchant, violate the laws, and incur a heavy penalty to the government, were presented to my consideration with great force.

As to the violation of the law, it is of such daily occurrence in the pursuits of men greedy for gain, that it furnishes but a slight presumption in opposition to facts, and the legitimate inferences from them. The penalty, like many in our own laws, may have been obsolete, and, in practice never enforced. And Baker, if he sought to share in the profits of Young's business, calculated to conceal his interest as well from the espionage of the government, as from the more keen and rigid scrutiny of those who might become creditors of the concern.

It is not clearly proved that Young was insolvent in 1828. The expression in his letter, on which the defendants rely, taken with his expectation of a surplus, if he were allowed to

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wind up his own affairs, is susceptible of a different construction. His meaning may have been, that he had always been embarrassed, and never able to meet his engagements as they matured. But if he were literally bankrupt in 1828, it does not relieve the case as to Mr. Baker. He was Baker's debtor in \$12,384 3, on the 14th of May, 1828, and after being charged with about \$11,000 of profits on those "*certain transactions*," which are involved in so much obscurity, the balance against him was only \$12,436 1½ on the 31st day of December, 1832. This shows a strong and manifest motive, influencing Baker in May, 1828, not merely to sustain Young in business for the purpose of obtaining payment of his large indebtedness, but relying on his commercial talents and his integrity and good faith, secretly to share with him the profits of all or portions of his business.

On the part of the plaintiff, there is other testimony strongly corroborating the inference he claims from the charge made by Baker for half the profits of "*certain transactions*."

Of this description is the entry in Mr. Baker's accounts, at the foot of the balance sheet of Kennedy & Young. Baker there says he has agreed with Young to leave \$5000 of the balance then due to him, in Young's hands for two or three years, or as long as convenient, on condition that it should be invested only in transactions which B. should approve; that B. was to have access to his books whenever he pleased; and, in the event of any embarrassment in Young's individual affairs, he should secure Baker in due season, for all the funds of his, then in Y.'s hands, so that B. should not suffer loss.

This entry contained every element of an agreement to furnish capital, with a participation in the profits, and without any risk of loss, except the expression of the division of profits. And this element was proved to have existed by the actual division of profits made every year, in the form heretofore stated. Such is the argument of the plaintiff, and it is one to which, on the testimony in the case, I can find no satisfactory answer.

The next entry of cash to Young's debit, of any magnitude,

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is \$2970, on the 31st of March, 1829, "delivered to him to be invested in certain transactions which offered profit." This, certainly, looks like a further advance of capital on the terms and for the purposes stated in the entry, upon which I have just commented, with the addition of a direct avowal of the intended participation in the offered profits. All the other entries of cash or bills of exchange advanced, which are contained in the accounts, appear to have been met, after short intervals, until 1833, by corresponding credits, either in large items of merchandize, or in money or bills returned, and they assume the character of temporary loans; thus strongly contrasting with the two charges of \$5000 and \$2970, respectively. This is another forcible corroboration of the argument, that those sums were the capital which Baker advanced to be invested in business which offered profit.

Further proof is furnished by Mr. Baker's letters. These reflect light upon the acts of the parties in 1828 and 1829, as well as subsequently, for the books show that there was no intervening charge. In one, dated January 29, 1833, in which he comments upon Young's account rendered for 1832, he insists on being credited for the price of the lots in Casilda, which was not yet due, and requests Young to make a sequel of the account current "with the introduction of the items omitted that may correspond to me (him) for the transactions of the year." He adds; he "would prefer our closing all our accounts at the end of this year." On the 2d of November, 1833, Young wrote to Baker respecting his difficulties, and urging an extension of time from his creditors. This letter undoubtedly treats Baker as a creditor, and all the accounts show he was such a creditor to a large amount. But it is in perfect harmony with the conclusion that he had been interested in the profits of Young's house, though not liable for losses.

In his answer to this letter, or a similar one, in which Y. proposed to give him some security, Baker, on the 30th of November, suspending his decision as to Young's proposal, made use of some remarkable expressions. He said,—“Should any

thing appear on your books relative to a note at the foot of your account current, in case your creditors present themselves against you, any security in my favor would not, in my opinion, be valid. You can, however, should this be not the case, secure me on your house in town, and in any other manner you think best, the amount you may suppose, from my observations, may be due to me." The only note at the foot of Young's accounts, to which this letter could have referred, is the one showing the terms upon which the \$5000 was left with Young, in May, 1828.

A note without date, but evidently following the one of 30th November, is still plainer in its import. Mr. Baker says—"On reflection, would advise that our accounts be made out without any mention of transactions, as I am certain, in the event of your securing me, it will be demanded by the creditors;" and, after his signature, he added—"Your books may probably express my having had interest in your transactions."

It is scarcely possible to account for all this solicitude as to the contents of Young's books, and the desire to avoid affording to Young's creditors any clue to a knowledge of those entries, on the supposition that Baker's interest in his affairs had been limited to a few occasional speculations in specific and distinct transactions. It is the natural language of a man, who was conscious that he had incurred a serious legal liability, by his implication in the affairs of a failing house; and who was attempting to forestall the means by which that liability might be established against him.

I have now brought together the leading circumstances and arguments, bearing upon the great point of the case. I have considered them with the care and deliberation due to the importance of the cause, and with no little anxiety, on account of the peculiar manner in which it has become my duty to decide on the facts in issue.

The absence of proof by Mr. Baker of the true meaning of the statedly recurring entries of the profits made by Young, on transactions not designated, when it is so apparent that such proof was in his power, has borne upon my mind with great

force. And, connecting those entries, and the want of evidence in explanation of their meaning, with the other entries upon which I have commented, the situation and conduct of the parties, and the letters of Baker to Young, I cannot resist the conclusion, that during the whole period, from the death of Kennedy to the failure of Young, Mr. Baker participated in the profits of the commercial house of Young. And while this rendered him liable as a partner to the commercial creditors of Young, I am equally clear, that, as between himself and Young, he was to have all his capital restored to him, without any diminution by the losses of the concern.

The plaintiff having established the joint indebtedness of Baker and Young, for which the judgment was recovered in 1834, the statute fixes the amount of the liability. It is neither more nor less, *prima facie*, than the amount of the judgment. (2 R. S. 377, § 1; *Mervin v. Kumbel*, 23 Wend. 293.)

A serious question then arises upon the stipulation entered into between the parties on the 19th of February, 1846. The plaintiff to prevent delay, and both parties to avoid expense, agreed, the one to deduct the disputed amount growing out of the seizure of the *Marmion's* cargo, in May, 1828, and the other to give no evidence on the subject to affect the judgment. It was further agreed, that the plaintiff should not be bound to deduct that sum, if the defendants should further postpone the trial of the cause beyond the first week in March term, 1846. The cause was tried in that week, and a verdict rendered for the defendants, which was afterwards set aside. The defendants, on two occasions since, have further postponed the trial.

By the literal terms of the stipulation, the plaintiff is not bound to make the deduction. I have doubts as to the true intents of the instrument, and as the case will unquestionably come before the whole court for review, I deem it best, without committing myself to any conclusion on the point, to hold it at this time with the plaintiff. If that be the true construction, no further trial will be requisite on this ground; and if the sum ought to be deducted, it can be done on disposing of the motion for a new trial.

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The sum due on the judgment recovered in 1834, exceeds the penalty of the defendants bond. My judgment will therefore be entered in the usual form, for the penalty, \$44,985 78.

The defendants made a case, and moved for a new trial.

*F. B. Cutting*, and *J. P. Hall*, for the defendants.

*H. P. Hastings*, and *J. A. Spencer*, for the plaintiff.

BY THE COURT. VANDERPOEL, J.—This is a motion for a new trial, as against the finding of Judge Sandford, before whom, by consent of the parties, this cause was tried without a jury.

The eightieth section of the act of 1847, in relation to the judiciary, (Laws of 1847, p. 345,) provides that, where a cause shall be on the calendar of any court for the trial of any issue or issues of fact, the issue or issues may, by consent of all the parties in the cause, be tried by the judge or officer holding the court, without a jury, and the finding of such judge or officer, on such issue or issues of fact, shall, in all respects, have the same effect as the verdict of a jury thereon, and no other; and the court or judge shall decide all questions of law arising on the trial of the issues, in the same manner as though such cause was tried by a jury.

The finding of the judge who tried the cause here, is, therefore, to have the same effect as the verdict of a jury; and we are, in reviewing it, to deal with it as we would with a verdict. If the judge has erroneously decided questions of law, our duty is clear; the cause, in that event, must be sent back for a new trial; but when he has dealt with *facts*, we should not, and will not, interfere with his finding, as contrary to evidence, unless there be a decided preponderance against such finding. The same rules of law that would guide us in reviewing the verdict of a jury, in respect to the weight of evidence, control us in looking at the finding of the judge, in regard to questions of fact, when he sits in the place of a jury. We do not mean to



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intimate, that we do not fully acquiesce in the conclusions of fact to which the learned judge arrived ; but if, sitting in his place, the majority of the court would have come to a different conclusion, it by no means follows, that we would, therefore, feel warranted in reversing the finding of the judge at the trial. It is entitled to just the same degree or measure of exemption from our interference, as the law awards to the verdict of a jury.(a)

When the testimony closed, the counsel for the defendants requested the judge to rule several propositions. These requests must be regarded in the same light as requests to charge, where a cause is tried by a jury.

(The judge here repeated the several points as inserted, *ante*, pp. 15 and 16.)

We are unanimous in the opinion, that the response of the judge to the first five propositions or requests to rule, was correct. He ruled contrary to what he was requested to do, as to each of these five propositions ; and his reasons for so ruling are very fully and clearly stated in his opinion, appended to the case. I cannot add to the force of the reasoning of that opinion, and am, therefore, content to let our entire concurrence in the conclusions of the judge upon these points, find its vindication and support in the views which he has deliberately, and so ably written out. I will not hazard the vain effort of adding to the force of those views.

The counsel for the defendants also moved for a nonsuit, on most of the grounds above stated. This motion was properly overruled. This necessarily follows, if the same points taken and repeated after the testimony closed, were unsound. After carefully looking at all the cases, as well those referred to in the opinion of the judge who tried the cause, as those cited by the counsel, we perceive no reason for differing from the judge's conclusion.

The great and main question in the cause is, Were Baker

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(a) See *Osborn v. Marquand*, Vol. I., page 457, S. P.



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and Young partners, so as to make them liable as joint contractors for the plaintiff's debt? The judge at the trial has found, that they were such partners, and has very fully commented on the evidence which has brought his mind to this conclusion. We have carefully considered the evidence, to which the judge adverts in support of his finding, and think it is strong enough to justify his conclusion. I do not feel called upon here, to dissect or review this evidence, after the very full exposition of it by the judge in his opinion. Suffice it to say, that we concur in the conclusion of the judge, as to this great and principal question in the cause. But if the majority of the court, sitting in the place of that judge, would have come to a different conclusion, we would not and could not, as before suggested, when reviewing this finding, lose sight of the fact, that we were dealing with what is equivalent to the verdict of a jury; and that such verdict must be manifestly and palpably against the weight of evidence, to authorize the granting a new trial on that ground. (*Jackson v. Loomis*, 12 Wend. 27.) So far from considering the verdict or finding here, as being against the weight of evidence, we consider it fairly warranted by the evidence. In support of this view, we deem it supererogatory to add any comments or illustrations to the able and elaborate reasoning of the judge who tried the cause.

The only remaining question, is one that arises on the stipulation between the parties, dated 19th of February, 1846. The plaintiff, to prevent delay, and both parties to avoid expense, agreed to deduct the disputed amount, growing out of the seizure of the *Marmion's* cargo, in May, 1828, or at the time of the confession of the judgment, which amount was then \$9,687 59. The defendants agreed not to give any evidence on the trial to show any error or alleged fraud on the part of the plaintiff, in stating an account and taking such judgment, so far as respects the allowance or disallowance of any sum or sums, item or items, in respect to the seizure, condemnation, redemption or restoration of the ship *Marmion* or her cargo, on her second voyage to Trinidad de Cuba, in 1828. It further provided, that the stipulation, *as to deduction*, should not bind the plaintiff, if

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the defendants should further postpone the trial of this cause beyond the first week in March term, 1846; and the plaintiff stipulated to bring the cause to trial at the March term.

The cause was tried in the first week of that term, and a verdict was rendered for the defendants, who made a case, and moved to set aside the verdict and for a new trial, which was granted, several terms after the verdict was rendered. The plaintiff again noticed his cause for trial, and then, on motion of the defendants, the trial was postponed on two occasions.

The question is, is the plaintiff still bound to make the deduction?

It is evident, that when the witnesses were examined in this cause, the counsel for the plaintiff supposed the stipulation was still in force. Mr. Pfister, the principal witness for the plaintiff, was asked by the counsel for the defendants, what was the exact amount of the balance, payment of which he demanded in behalf of the plaintiff. He answered, that it was the balance of all the accounts, including the Marmion and her cargo; and the counsel for the plaintiff objected to any inquiry, relating to the seizure of the Marmion or her cargo, as a violation of the stipulation of the 19th of February, 1846, and the counsel for the defendant yielded the point. The plaintiff, surely, could not keep part of the stipulation alive, (that part which makes in his favor,) and hold the residue not binding. It must stand or fall for the whole. Again, the counsel for the defendant asked the witness, Pfister, who seized the cargo of the Marmion. The counsel for the plaintiff objected to the question, as violating the stipulation, and the counsel for the defendants, disclaiming all intention to violate the stipulation, withdrew the question.

Now, it would be gross injustice to the defendants, after the plaintiff's insisting upon the binding force of the stipulation on the trial, and after having had the full benefit of it, in the exclusion or withdrawal of testimony offered by the defendants, to hold that the defendants are to be cut off from all the benefits intended to be secured to them by the stipulation.

We are, moreover, of the opinion that the counsel for the plaintiff was right on the trial, in supposing that the stipulation was not rendered defunct or nugatory by the postponements of the cause after the defendant had procured an order for a new trial. The manifest object of the plaintiff, in entering into the stipulation, was to procure a trial of this cause in the first week in March term, 1846. The defendants did not throw any obstruction in the way of procuring the cause to be then tried. It was tried, and here the defendants part of the stipulation, (the consideration for plaintiff's entering into it,) was performed and executed, and he was absolutely entitled to the deduction provided for. The plaintiff's claim was reduced *pro tanto*, the moment he attained his object, viz. : a trial in the first week of that March term. The application for postponement, after an order for a new trial was made, could not work a forfeiture of a right which the defendants had secured, by having fulfilled their part of the stipulation.

This conclusion is strengthened, when we consider that the defendants, according to the terms of the stipulation, had waived their order for a commission to examine further witnesses, and, for aught we know, may thereby have waived testimony, which would have precluded the court from granting a new trial. But we deem the necessity for holding valid the stipulation imperative, when we consider that the defendants, on the objection of the plaintiff, and in pursuance of the stipulation, forebore to give any evidence on the last trial, to show error or fraud in the judgment, so far as it relates to the Marmion and her cargo.

If the plaintiff should elect to deduct the sum of \$9,687 59, from the amount of his judgment, as of the time provided for by the stipulation, the verdict or finding of the judge must stand for the residue of the judgment entered on confession. If he shall not, within twenty days, signify his consent or election in writing, to make such deduction, there must be an order for a new trial; the costs to abide the event of the suit.

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(The plaintiff made the deduction, and judgment was entered accordingly.)(a)

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(a) The defendants appealed to the court of appeals, where on deciding the cause, it appeared that four judges were in favor of sustaining the defendants motion for a nonsuit, on the ground that the plaintiff had not proved such a demand against Baker as was claimed and described in the plaintiff's petition for the attachment, upon which the bond in suit was executed. That the plaintiff's demand against Baker should have been described as being upon contract, and not upon a judgment; and should have set forth the original cause of action. Three judges held, that the decision of the superior court on this point, was correct, and one judge was absent. As the concurrence of five judges of the court of appeals is necessary to pronounce a judgment, (Amended Code of 1849, § 14,) the point appears to stand as the superior court decided it. One of the three judges who agreed with the latter court on this point, held that the plaintiff ought to have been nonsuited below, for the want of sufficient proof of a partnership between Young and Baker; and on this ground alone, voted with the four judges first mentioned, in favor of a reversal. No other judge concurred with him as to the nonsuit. See a history of the matter in the N. Y. Legal Observer, Vol. 8, p. 123.

And see note to this case in the index, under the title "Judgment and Execution."

LOHMAN v. THE NEW YORK AND ERIE RAIL ROAD  
COMPANY.

Where the charter of a corporation, after providing for a subscription to the capital stock on a public notice, authorized the directors, if the whole were not then taken, from time to time to cause the books for the subscriptions of stock to be opened until a sufficient sum was subscribed; the further subscriptions so authorized, may be made without any public notice of opening the books; and the power to receive the same may be delegated to officers or agents of the corporation.

The object of a subscription in filling the stock of a corporation, is to furnish evidence of the subscriber's liability to pay up his shares, and to identify the persons who have become shareholders.

No particular form of subscription is necessary; and when the shares are paid up at the time of their being first taken, the stock certificate issued, and the party's receipt for the shares, constitute a sufficient subscription.

A corporation having power to issue further capital stock, may issue the same in exchange for an equal amount of its indebtedness.

Where there was express authority from the directors to the principal officers of a corporation, to issue stock in exchange for three distinct classes of indebtedness, and those officers for a considerable period, had been in the habit of thus issuing stock, in exchange for those, and for a fourth class not embraced in the express authority; and their acts had never been disclaimed or questioned by the directors, or the corporation; it was *held*, that their issue of stock in exchange for such fourth class of indebtedness, was valid and binding upon the corporation, and equally binding upon the creditor who accepted such stock.

One who exchanges his debt against a corporation, for capital stock issued by its principal officers, without inquiring as to their authority, is not at liberty to annul the contract, because their authority was not express, but was a full implied authority derived from the course of business, and from similar acts affirmed or acquiesced in.

Where the stock of a company was usually transferred on two distinct books, to the stock transferred on one of which share brokers attached a greater value than to that on the other; and a creditor agreed to exchange his debt for stock, on the officers stating that such stock could be transferred on the former; and after completing such exchange, the officers refused to allow a transfer of it to be entered on such book; it was *held*, the creditor could not for that cause rescind the exchange, but that his remedy was in an action for damages.

May 26, 27; July 8, 1848.

MOTION by the plaintiff for a new trial, on a case. The action was trover, brought to recover certain certificates of in-

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Lohman v. New York and Erie R. R. Co.

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debtedness issued by the defendants, commonly called bonds, which the plaintiff owned on the second day of January, 1846.

Upon the trial of the cause, the following matters appeared in evidence. The defendants were incorporated by an act of the legislature, passed April 24, 1832, with a capital of ten millions of dollars, in shares of one hundred dollars each, (which were to be deemed personal property, and transferable as its by-laws should direct,) with power to construct and maintain a railway, with one, two, or three tracks, from the city of New York, or its vicinity, to Lake Erie, through the southern tier of counties in this state. By the fourth section of the act, a large number of persons were designated as commissioners, and it was made their duty to open books to receive subscriptions to the capital stock of the company, giving twenty days notice thereof, by advertisement in the newspapers, and to keep the books open three days. As soon as the stock was subscribed, directors were to be elected, under the inspection of the commissioners. By the fifth section, if there were an excess of subscription to the stock, the commissioners were to apportion the stock among the subscribers; "And if the full amount of capital be not subscribed within three days as aforesaid, then it shall be the duty of the commissioners to open the subscription books from time to time until the whole amount shall have been subscribed: the commissioners shall receive no subscriptions, unless five dollars on each share subscribed be paid at the time of subscription." By the sixteenth section, the directors were authorized to require payment of the sums to be subscribed to the capital stock, at such times, in such proportions, and on such conditions, as they should deem fit; giving public notice of the calls respectively. (Laws of 1832, ch. 224, p. 402.)

The charter was amended on the nineteenth day of April, 1833, by an act which directed the commissioners to open the books on the second Tuesday of July ensuing. If in three days the whole amount of the capital were not subscribed, the commissioners were to ascertain how much had been applied for. If one million should have been subscribed, or as soon

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**Lohman v. New York and Erie R. R. Co.**

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thereafter as a million should be subscribed, the commissioners were to proceed and organize the company. The third section was as follows :

“If the directors shall be chosen, and the company organized by virtue of the preceding section, it shall be the duty of the directors so chosen, or their successors, from time to time, to cause the books for the subscriptions of stock to be opened until a sum sufficient to complete the work from Hudson River to Lake Erie shall be subscribed, but the time for the completion of said road shall not be deemed to be extended by this act.” (Laws of 1833, ch. 182, p. 229.)

Under this act, the requisite amount of stock was subscribed, and the company was organized by the choice of a board of directors, the usual officers were appointed, and the rail road was commenced. Various acts of the legislature were subsequently passed, in aid of the corporation, and recognizing its proceedings in different forms.

On the 10th of May, 1843, the board of directors adopted a series of resolutions, authorizing the executive committee to settle with creditors of the company, and pay them in the general stock of the corporation ; also, to issue certificates of indebtedness of the company to the amount of \$300,000, at not less than five years, bearing interest at six per cent. per annum, and chargeable on the revenues of the eastern division of the rail road ; and to issue a further amount of certificates to the extent of \$300,000, at not less than five years, and bearing interest at seven per cent., which should be receivable at par in payment of subscriptions to the capital stock.

On the 8th of November, 1844, a statement was made and a resolution adopted by the board of directors, in these words, viz. :—

“The president stated propositions had been made by holders of the certificates of the company which fall due on the 1st of January, 1849, to exchange the same, with the addition of interest to the time of maturity, for the stock of the company.

“Mr. Griswold moved that all such propositions be accepted,

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**Lohman v. New York and Erie R. R. Co.**

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and that the treasurer and secretary be authorized to carry the same into effect, which motion was adopted."

On the 7th day of October, 1845, the directors adopted a resolution, referring the subject of receiving the seven per cent. certificates of the company in payment of its full stock, to the president and treasurer with power.

The minutes of the board of directors, exhibit the following proceeding as having occurred on the 1st day of December, 1845, viz. :—

"On motion of Mr. Brown, the following resolution was adopted :

"Resolved, that the resolution passed the 8th day of November, 1844, authorizing the secretary and treasurer to receive the certificates of the company in payment for stock, with the addition of five years interest to the same, be, and is hereby, repealed."

Mr. Brown, who offered this resolution, was also the treasurer of the corporation, and he testified as a witness on the trial, that its object was to repeal no part of the resolution of November 8th, 1844, except that which allowed stock to be issued for the unearned interest on the certificates of indebtedness. He also testified, that for two years and a half prior to January, 1846, the officers of the company had been in the practice of issuing stock for the corporation, both the president and treasurer, and also the treasurer and secretary. They had thus issued from five hundred to seven hundred shares. The treasurer had the principal management of the issues of stock, and made the agreements with the creditors in New York to issue stock for debts, and the agent made like agreements with the creditors on the line of the road. In eight instances, the issue of stock had been arranged by agents of the executive committee, and by the officers of the company. The president and secretary signed all the certificates of capital stock, and all were regularly entered on the books of the company. Between the first of December, 1845, and the second day of January, 1846, there were several instances of stock issued for indebtedness.

It further appeared on the trial, that by an act in relation to



The New York and Erie Rail Road Company, passed May 14th, 1845, a fresh subscription of stock, to the amount of three millions of dollars, one-fourth payable on subscribing, was directed to be made, on which being done, the state of New York, by the terms of the act, would relinquish to the like extent its lien on the road, for a loan made to the corporation in 1838; but the old stockholders were not to participate in the benefits of the provisions made by this act, unless they would surrender to the company their stock certificates, and receive therefor for every two shares of stock theretofore issued, one share of stock to be thereupon issued. (Laws of 1845, ch. 325, p. 352.)

Under this act, \$3,400,000 of new stock was subscribed in October and November, 1845. The stock issued pursuant to the act of 1845, for the outstanding shares surrendered, was denominated in the company's office, and was known among share-brokers and dealers, as "*consolidated*" stock.

The company kept a transfer book in which were entered the transfers of the consolidated stock; and another old transfer book, on which were entered fractional shares. In issuing stock for indebtedness after the passage of the act of 1845, the transfer clerk usually wrote across the face of the scrip the words, "equal to consolidated," and the transfers of such stock were made on the transfer book of consolidated stock, although the certificates issued to the transferee were marked "equal to consolidated," like those surrendered. The object of this, was to distinguish the stock so issued for debt, from the old consolidated stock.

The plaintiff was the holder of twenty-three certificates of indebtedness of the defendants, issued November 1st, 1843, and January 1st, 1844, bearing interest at six per cent., payable half-yearly, and the principal payable January 1, 1849; amounting in the aggregate, to \$6000. Six of these bonds of the earlier date, and amounting to three thousand dollars, were signed by the president and treasurer. Nine of the same date, signed by the treasurer and an agent, amounted to about \$2575. The residue were signed by the officers last named, and were dated January 1st, 1844.

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On the 2d day of January, 1846, the plaintiff applied to the treasurer of the company to exchange them for stock. While at the office negotiating, he asked the transfer clerk, if the stock he should take, could be transferred on the transfer book of consolidated stock, and was informed it could be so transferred. He told the clerk he wanted to sell it, and transfer it on that book. Thereupon the exchange was made, the certificates of indebtedness surrendered to the company, and the plaintiff received a certificate for sixty shares of the capital stock of the company, in the usual form, signed by the president and secretary. Across its face was written "equal to consolidated stock," with the secretary's signature. The plaintiff signed a receipt for the stock, in the margin of the scrip book. The negotiation and arrangement were made by the treasurer and secretary of the company. The bargain was for stock, "equal to consolidated." The plaintiff stipulated for the privilege of rescinding his contract, at or before two o'clock of the succeeding day. The treasurer assented to this, and the stipulation was reduced to writing, and signed by the transfer clerk, in these words:—

"N. Y. AND ERIE R. R. OFFICE,

"*New York, January 2, 1846.*

"Mr. Chas. Lohman having this day exchanged with the N. Y. and Erie R. R. Co. six per cent. certificates to the amount of six thousand dollars, for the same amount of stock of the company 'equal to consolidated;' it is hereby understood and agreed, that in case he should wish to re-exchange the same, he has the privilege of doing so any time previous to 2 o'clock Saturday, 3d January, 1846."

At this time, there was a great excitement among the dealers in stocks, growing out of what they technically termed, "*a corner*" in the stock of this company; large contracts to deliver the stock on time, maturing on the 3d day of January, and the quantity deliverable not being procurable in the market. A large amount of the company's certificates of indebtedness was offered to the company in exchange for stock on the 2d of January, after the issue to the plaintiff; so large, that the officers at first hesitated to issue the stock, but finally they issued it

the next day. Mean time, and early in the morning of the 3d day of January, the president instructed the transfer clerk, to permit no more stock "equal to consolidated," to be transferred on the book of consolidated stock, but to enter the transfers in the old stock book, used for fractions, &c.; still marking it, "equal to consolidated." The stock brokers refused to receive the stock so transferred, on contracts for stock of the company, and on the afternoon of January 2d, they designated it as "*converted stock*." During that afternoon, the "*converted stock*" sold at the board of brokers at 55 per cent., and the "*consolidated*" at 85 per cent. In the morning, sales of the latter were made at par. The prices on the 3d day of January, were about the same as in the afternoon of the second. After the 2d of January, the stock previously issued for debt, and marked "equal to consolidated," was all called by the brokers "*converted stock*."

The plaintiff might have sold his stock at par on the 2d of January, if it had been of the scrip transferable on the consolidated book. He did not, however, make any contract for its sale, nor apply to transfer it. On the 3d day of January, but not till after 3 o'clock, P. M., the plaintiff called at the office of the company, and demanded a return of his certificates of indebtedness, and offered to deliver up his certificate of stock. The officers declined to re-exchange, because it was after the time stipulated in the agreement for that purpose. The plaintiff thereupon brought this suit.

At the trial, he contended, and requested the judge to charge, that the directors of the company had no authority to issue the capital stock, and take pay therefor in the certificates delivered to them by the plaintiff. That the treasurer and secretary had not, on the 2d day of January, 1846, authority to issue the stock to the plaintiff in exchange for the six per cent. certificates; and when the plaintiff demanded them back, and offered to give up the stock, the agreement for the exchange was not binding on the corporation, and the latter had the right to dissent from it; and as it was not binding on the corporation, no valid contract existed. That on the 3d of January, the directors had the right to disavow and repudiate the agreement made

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by those officers with the plaintiff, and therefore the latter could tender back the stock and demand the bonds at any time before the corporation had adopted the contract. That if the contract was made under a belief by those officers, that they had the authority to issue the stock and make it transferable on the consolidated book, when in fact they had no such authority, then the agreement being founded on mutual mistake, was voidable, and the plaintiff had the right to demand a return of his bonds. If he acted under such mistake, and the officers knew it, and knew they had no authority to bind the corporation without the assent of the directors, then it was a fraud on the plaintiff, and he could rescind the contract.

That if the agreement for the exchange was that the stock was to be transferable on the regular consolidated transfer book, and the plaintiff would not have entered into it except on that understanding ; and if on the morning of January 3d, the transfer clerk was ordered not to allow the stock issued to the plaintiff to be transferred on that book ; then the corporation had not ratified the agreement made by the treasurer and secretary, and the plaintiff on discovering that fact, had the right to demand back his bonds and return the stock. The not recognizing and the repudiation of that part of the agreement, authorized the plaintiff to treat the whole contract as at an end. That if the plaintiff, on learning of the orders not to permit a transfer on the consolidated book, would have returned the stock and taken his bonds before 2 o'clock, P. M., of January 3d, then it was the defendants duty to have notified him of those orders ; and he had a right, whenever he ascertained them, though after that hour, to rescind the contract. And that he had the same right, if it were a material inducement without which he would not have contracted, that the stock to be issued to him should be transferable on that book ; and if on the morning of January 3d, the company determined not to permit the stock to be transferred on that book. Also, that under the circumstances last supposed, and those given in evidence, the plaintiff had the right to rescind, whenever he discovered that the corporation had determined not to allow his stock to be transferred on the regular transfer book of consolidated stock.

And that if the jury found that the agreement between the plaintiff and the treasurer and secretary, was made by the former on the faith of representations made by those two officers, which were untrue; he had the right to demand back his bonds, whether they made such representations fraudulently or ignorantly.

The defendants asked the court to instruct the jury, that the defendants had authority on the 2d January, 1846, to take new subscriptions to their stock, and in such form and manner as their board of directors should think proper. That their officers, viz. : their president, secretary and treasurer, being their general agents, and charged with the taking of additional subscriptions to the stock, were authorized on that day to take the plaintiff's subscription for sixty shares, and take pay for them in the bonds of the defendants. That there has been no conversion of the bonds of the plaintiffs. Time being the essence of the contract, and no offer to re-exchange until after the time specified in the contract, the cancelling and retaining of the bonds by the defendants were legal and right. If the plaintiff had any claim against the defendants, having given him a certificate unauthorized by law, and on that account of no value, his remedy is not in trover, as he voluntarily parted with his title, and without any fraud or fault on the part of the defendants. That the conversation and engagement, if any, respecting transferring the plaintiff's stock in the book for transferring consolidated stock, was anterior to the completion of the arrangement to exchange the bonds for stock, and that agreement being reduced to writing, the writing is the sole and only evidence of the agreement between the parties. That the transfer clerk had no authority to negotiate for or agree upon terms for the exchange of the bonds for stock, and the defendants are not bound for any thing he said on that subject, or relating to it. That the book on which the transfer of the stock was to be made, was not one of the conditions or terms of the purchase; all those are embraced in the written agreement. If any thing, the arrangement on that subject is collateral to the exchange, and a breach of it only furnishes ground for an action for damages.

The judge charged the jury, that under the circumstances

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proved, and the acts relative to the defendants, the stock issued to the plaintiff was valid as against the company. That if it were a part of the agreement between the plaintiff and the company, that the stock was to be transferable on the consolidated transfer book, (and such appears to be the evidence,) and the company next day directed that a transfer on that book should not be permitted ; then the refusal of the company to allow such a transfer, was a violation of the agreement, and entitled the plaintiff to sue for damages. He has not, however, brought a suit for a breach of contract. but has brought one founded upon the position that the contract was rescinded. Instead of claiming damages, he repudiates the whole agreement, and demands a return of the bonds.

To sustain this suit, a violation of the agreement by the company, is not sufficient. The plaintiff must prove that the contract was not fair on their part, and that there was a deceptive and fraudulent intent in making it. It is not enough that there may have been mistake or misapprehension on his part. A deception must have been practised upon him.

Though by determining not to permit a transfer of this stock on the consolidated transfer book, and omitting to notify the plaintiff thereof before two o'clock on the 3d of January, the defendants may have exposed themselves to an action for damages; yet as matter of law, they did not thereby rescind the whole agreement, so as to entitle the plaintiff to maintain this suit. The whole, therefore, results in this, that unless the jury find that an intention to defraud him existed at the time the contract was made, the plaintiff cannot recover.

The plaintiff excepted to the judge's charge, and to his omission to charge as requested. The jury found a verdict for the defendants.

*F. B. Cutting*, for the plaintiff.

*S. A. Foot*, for the defendants.

BY THE COURT. SANDFORD, J.—The plaintiff contends, that the contract made with him for exchanging his bonds for the

stock of the company, never was binding upon the latter, and therefore his title to the bonds was unaffected by the exchange. His first point in support of this position, is that the directors of the company had no authority to issue capital stock, and receive in payment the bonds or indebtedness of the company. On this subject, we entertain no doubt of the authority of the directors, to issue the unsubscribed stock, whenever and as often as opportunities were presented. The act of 1833, contains an express grant of power to this effect, without restriction as to time, place, previous notice, or the form of the subscription. The directors were entrusted with the duty of forwarding the construction of this rail road, which, as the course of legislation respecting it shows, has been deemed by the state government, a highly important public enterprise. And to enable them to accomplish it, the statutes relative to this corporation, instead of the usual pre-requisite in stock corporations, of a full subscription of the capital, authorized it to proceed when one-tenth part of its intended capital was taken, and to obtain further subscriptions from time to time, until a sufficient sum should be procured to complete the work. Indeed, it seems the commissioners appointed to open the books, by the original charter, were unrestricted as to the time and manner of obtaining subscriptions, after offering the stock to the public for three days, under an advertisement.

As to the form of the subscription, no particular form is necessary. The object of a subscription being, to furnish evidence of the liability of the subscriber to pay up his shares, and also to show who have become the shareholders of a corporation ; it becomes a mere ceremony, where the new stockholder on receiving his shares, pays them up in full, and takes his certificate, which has been previously entered in the stock ledger. This may not, perhaps, dispense with the observance of the ceremony, although it be useless ; but in this case, there was a subscription, sufficiently formal, in the plaintiff's receipt for the shares, written in the margin of the scrip book.

The mode of payment for the stock in question, is also made an objection to the authority of the directors ; but as we think, without any good cause. We doubt the propriety of the plain-



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tiff's finding fault with his shares, because he paid for them in the debt of the company, instead of paying cash. Nor do we assent to the argument, that the company, under a new direction, could have repudiated the shares, whatever might have been its remedy against the plaintiff for the amount payable to make them full shares, assuming that payment in bonds was unauthorized.

But to return to the transaction before us, we think it entirely free from objection. The plaintiff was the holder of the company's bonds, and entitled to receive payment of their full amount, in cash, when they matured. If the company had procured some other person to subscribe for sixty shares of stock, and to pay them up in full ; the six thousand dollars thus obtained, could do no more than pay the plaintiff's bonds. Thus, it made no possible difference to the company, or to the prior stockholders, whether the plaintiff took the shares and cancelled the bonds, or whether another party took the same shares, paid the amount, and the company with that sum, discharged the bonds. On the assumption that the stock had some value, and the debts would be paid, it was all one to the company ; and if the stock were worth nothing, no one but the plaintiff could be injured by the exchange. It is to be observed, that the bonds in question were not issued to the plaintiff, on an agreement to receive them for stock, or for an amount or consideration enhanced by the circumstance that they would be paid in stock, and not in money.

We are satisfied that the exchange of the stock for the bonds, was valid, so far as it is to be deemed the act of the directors of the company.

But the plaintiff next insists, that the directors could not delegate the power to receive subscriptions to the capital stock ; that they never authorized the exchange in question ; and that the treasurer and secretary had no authority from them to make the exchange ; which therefore, was an invalid contract, not binding on either party, when the plaintiff demanded back his bonds.

First, as to the delegation of authority. The directors could not always be in session, either as a board or by committees.



They necessarily acted by agents, and we perceive no good reason why the power to receive subscriptions to the capital stock, could not be conferred on one or more agents, with as much propriety as the far more important power of contracting for labor, materials, and the like, in the construction of the road.

Then, as to the authority conferred on the treasurer and secretary. We have no doubt that the resolution of November 8th, 1844, authorized those officers to issue stock for such bonds as the plaintiff held. The spirit of the resolution, and the object in view, are sufficient to show that the resolution was not limited in its effect to propositions which had already been made. But there is a difficulty in sustaining this exchange under the resolution of November, 1844, in consequence of the repealing resolution of December 1st, 1845. We are unable to read the latter, so as to restrict its operation to the mere allowance of interest not yet earned on the certificates of the company. It is in its plain terms, a repeal of the entire resolution of November 8th, 1844. At the same time, there is no room on the facts, to doubt that the intention of the directors was simply to prohibit the issue of stock for the unearned interest on the bonds. In addition to the positive testimony of the treasurer who brought in the repealing resolution, and the practice of the company in accordance with his statement; there is the circumstance that the conversion of the company's actual debt into stock, remained as important and desirable as it ever had been; and the recent cash subscription of over three millions under the act of 1845, would account for the change intended to be accomplished by the resolution of December 1st, 1845, as it would not be just to those new stockholders to issue stock for debts with the addition of three years of unearned interest. Nevertheless, we feel great difficulty in construing the repealing resolution by clear proof its object and intention, when its language is as clearly the other way; and we will waive the point.

The testimony shows, that for at least three distinct classes of indebtedness, stock had been issued for periods of from one year to two years and a half, by several officers of the company,

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under express authority from the directors. Such authority existed in the treasurer and secretary, as to the class to which the bonds in question belonged, from November 8th, 1844, to December 1st, 1845, if no longer. Those two officers had for two years and a half, been in the practice of issuing stock, in the manner that was pursued in this instance, without any express power, so far as it appeared, except the resolution of November 8th, 1844; and the treasurer had in like manner from time to time, made agreements with the New York creditors to issue stock for their debts. In this respect, the treasurer seems to have exercised the authority which was conferred on the executive committee by the directors in May, 1843.

These issues of stock for indebtedness, by the treasurer and secretary, had extended to about six hundred shares. The president and treasurer were also expressly authorized in respect of a class of seven per cent. certificates, by a resolution of October 7th, 1845. The president, treasurer, and secretary, were the principal officers, and in their respective spheres, the agents of the company. The acts of these several officers in thus issuing stock for indebtedness, had never been disclaimed, or questioned, by the directors or the company. They had proceeded so long, and to so great an extent, that ignorance on the part of the company could not be asserted, and silence and acquiescence had ripened into indisputable authority.

Under such circumstances, the exchange in question was negotiated and agreed upon, between the plaintiff on the one hand, and the treasurer and secretary, acting in behalf of the company, on the other, and was approved by the president; the contract was executed, and the plaintiff received scrip for his shares, with the regular signatures and authentication of the president and secretary, and the proper entries in the company's books.

We are convinced, that the company could never have set aside this transaction, on any pretence of want of authority in these their three principal officers. The facts we have stated, would be perfectly conclusive against any such attempt on the part of the company. The implied authority, from the course of business, and from similar acts done without challenge or

disaffirmance, is as potent as an express resolution of the board of directors. The contract was, therefore, valid and binding upon the company. Was it any less valid against the plaintiff? It is contended, that he was not bound, because there was no express authority given to those officers, and the plaintiff cannot be held, upon one implied from previous acts, which were not authorized at the time, and which could at any time have been repudiated. That the company cannot bind him upon an apparent authority in its officers to contract, when in fact there was no real authority.

We think there is no difficulty on this subject. The practical good sense of the matter is this. The plaintiff dealt with the three principal officers of the company, without inquiring into their powers; willing to act, and acting, on their apparent authority to issue stock for debts. If he had inquired into their authority, and found it to be implied from usage and acquiescence merely, and had chosen to proceed with the exchange, he could have held the company bound. He cannot now, because he omitted to inquire, withdraw from the contract, on finding that they had such implied authority, and no other. In any contested point of authority on the part of the company, it would be incumbent on him to prove its existence; and proving a power implied from acts, would be as effective as the most positive authority in writing. The same proof must be valid against him; with no difference, save that more full proof would be required from the company than from him, to establish the implied power. The contract for the exchange of the bonds for the stock, was therefore valid, and bound both parties.

The next questions arise upon the transfer book of consolidated stock, and the plaintiff claims that the contract was rescinded by the company's direction on the morning of January 3d, not to permit transfers of this species of stock on the consolidated transfer book.

This was claimed at the trial, upon the ground, among others, that the defendants had been guilty of a constructive fraud in the transaction. The question of fraud was submitted to the jury, and they have negatived it by their verdict. As to the misrepresentations said to have been made by the officers of the

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company, in ignorance, and not with any fraudulent intent; they relate first, to their authority to issue the stock, and second, to their assurance that it might be transferred on the book of consolidated stock. As to the first, we have stated our conclusion that they had authority. The assurance as to the transfer book, was not made by either of the officers having any authority, real or apparent, or with any one who contracted with the plaintiff. But if it had been made by the latter, there was no misrepresentation. When the statement was made, such stock was permitted to be transferred on the consolidated book. If the plaintiff had any right to rely upon their promise that it should continue to be so transferable, it at most, formed part of the contract between the parties, for a breach of which the defendants would be liable in damages. Their omission to apprise him of their determination to use another transfer book for this species of stock, may also have been the ground of an action; if it prevented him from re-exchanging his stock for the bonds, within the time stipulated for that purpose. We do not undertake to decide whether the change in the transfer book made any difference in the value of the stock.

In every aspect of the case, we are bound to say, that the contract for the exchange, was a valid, executed contract, on the second day of January; unaffected by any fraud, actual or constructive. When the defendants issued and delivered to the plaintiff scrip for sixty shares of stock, they performed it, so far as it was then capable of execution. If the defendants failed to fulfil such of its obligations as were to be subsequently performed, the plaintiff should have sued them for the breach. If they so conducted, that they prevented him from availing himself of the provision for a re-exchange, and he was thereby injured, he had his appropriate remedy, in an action on the case for damages. But neither of these events avoided the original contract, or warranted the plaintiff in treating it as rescinded.

We have discussed these points, as if the understanding relative to the transfer book, were to be deemed a valid and subsisting portion of the agreement. The defendants insist, that as the agreement was reduced to writing in the issue of the shares

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and the stipulation for re-exchange, no evidence of the alleged understanding is admissible. We do not intend by our decision, to sanction the introduction of the testimony, or to pass upon the question.

Upon the whole, we are satisfied that the ruling of the judge at the trial, was correct, and that the action cannot be maintained.

Motion for a new trial denied.

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**SHERWOOD AND BOWERMAN v. RUGGLES.**

The question of sea-worthiness, is a matter of fact to be decided by the jury on the evidence.

There is no legal presumption that a vessel is unseaworthy, from the fact of her leaking within a few hours after her sailing, there being no unusual stress of weather.

The owners of a vessel have a lien upon the cargo, for the proper proportion of the general average, on an injury to the vessel by the perils of the sea.

The owners remedy against the consignee, is not lost by the latter's receiving the cargo at the port of necessity and forwarding it himself to its destination.

If after a vessel is disabled, the master can in a reasonable time, communicate with his owners, it is his duty to do so, before making repairs ; and such delay does not relieve the owner of the cargo from contribution.

It is for the jury to say, upon all the circumstances, whether the delay in order to communicate be reasonable.

July 7, 8 ; July 15, 1848.

**ASSUMPSIT** for average on a cargo of turpentine, tried before the Chief Justice, in October, 1847.

The plaintiffs proved the shipment of 1150 barrels, on board of their schooner, the *Cornelia*, at Swansborough, North Carolina, on the 16th September, 1845, consigned to the defendant at New York. The vessel sailed, September 22d. The next day, about three hours after they crossed the bar, in a gale of wind, she sprung a leak, and it became necessary to put back. She did not succeed in getting into S., and finally, on the 25th, went into the port of Beaufort. There the cargo was dis-

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charged, and the vessel hauled up; a survey was had, and repairs made to the amount of \$368. She was then taken to the wharf, and reloaded. While lying there in October, a gale of wind and heavy sea drove her upon an old wharf under water, where she pounded, and again leaked, so that the tide ebbed and flowed in her. Another survey was called, and the master wrote to his owners in New York for advice. They advised him to go on with repairs, and while so doing, an agent of the underwriters came on, took charge of the vessel, and completed her repairs.

The cargo was again taken on board, and the *Cornelia* sailed for New York in December, 1845. Had bad weather, and in a heavy gale on the 12th of December, off Cape Hatteras, the vessel was so far disabled, that she had to go back to Beaufort. She lost some of her deck load, her small boats, and one anchor in crossing the bar; and some of the load was thrown overboard to ease the vessel. Another survey was called, when extensive repairs were advised. The master wrote to his owners for advice, and came himself to New York directly afterwards.

While the *Cornelia* was lying at Beaufort in October and November, there was no suitable vessel to be had there to bring on the cargo. She was ultimately repaired, and came on to New York in the spring of 1846. Mean time, the defendant, by agreement with the owners, sent a vessel to Beaufort in January, 1846, which there received 999 barrels of the turpentine originally shipped on the *Cornelia*, and brought it to him at New York.

The freight payable by the bill of lading, signed by the master of the *Cornelia*, was thirty-five cents per barrel, with primage and average accustomed. On the adjustment of the average, made by a broker, the amount of the special charges against the cargo, was \$87 90, and of the general average, \$643 71. The defendant furnished the broker with the valuation of the cargo, and examined the statement. He refused to pay the general average charged to the cargo. The statement was sent to the underwriters. The plaintiffs then proved, (the evidence being objected to,) to show defendant's acquiescence in the

results of the adjustment of average, that he received from the underwriters, the amount of his loss and general average on the cargo of the *Cornelia*, in August, 1846.

The defendant claimed that the vessel was unseaworthy, and that there was unreasonable delay in the port of Beaufort, to his great loss in the value of the cargo.

The judge, in charging the jury, said, the first ground of defence is, that the 1150 barrels of turpentine composing the cargo, were not delivered to the defendant according to his contract with the plaintiffs. But there is abundant evidence to show that this property did come into defendant's possession. It is shown that he sent a vessel for it, and it appears from his statement to Mr. Johnson, that he sold it at two dollars and seventy-five cents per barrel. The second ground of defence is, that there was unreasonable and unnecessary delay on the part of the captain in the port of Beaufort; that this delay was unauthorized, and such as the captain had no right to make. But it is not the rule of law, that the captain is bound to proceed immediately to repair the effects of a storm, without waiting to communicate with his owners. If he can do so in a reasonable time, it is his right and his duty to communicate with them, and to wait for advice. If the jury find in this case, a fair exercise of that right, this ground of defence fails.

But the main ground of defence is, that the vessel was unseaworthy. This is a matter of fact to be decided by the jury, on the evidence. The defendant's counsel has relied upon the log-book, protests, and surveys made at the time. These, though not evidence, have been admitted, because not objected to by the other side. If she was not fit for this voyage, and therefore loss occurred, the defendant is not responsible in this action.

Defendant's counsel excepted to the charge of the Chief Justice respecting the right of the captain to wait and communicate with his owners; and requested him to charge the jury, that from the vessel leaking two hours after she sailed, she must be presumed unseaworthy, unless an adequate cause for that leak is shown by the plaintiffs; and that no such cause has been shown, and that the fact of such leak has been proved by legal and competent evidence. The judge assented to the



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general principle of law laid down by defendant's counsel ; but stated that the question whether an adequate cause had been shown, was one for the decision of the jury.

The jury rendered a verdict for the plaintiffs ; and the defendant moved for a new trial.

*H. Ketchum*, for the defendant.

*F. B. Cutting*, for the plaintiffs.

BY THE COURT. VANDERPOEL, J.—The question whether the vessel was seaworthy, was purely one of *fact*. It was fairly submitted to the jury, and they have found that she was seaworthy. Barnum testified, that in 1844 he repaired the schooner for the plaintiffs ; that he cut her down to the water's edge, put in new timbers, new ceiling, new outside from the bottom to the rail ; that he took out all the ceiling, and left only the keel, stern, stern-post, and a few floor timbers. He says, he substantially rebuilt her.

The witness Newman also testified, that he was a shipwright ; that he examined the schooner *Cornelia* about eighteen months ago, at the request of Mr. Johnson. They put her on the dock, and the witness examined her to ascertain the cost of repairs. She was then in good condition, except that her stern-post had been started.

To this is opposed the fact, that the vessel sprang a leak so soon after the commencement of the voyage. We cannot, on the strength of this fact, assume the responsibility of overruling the finding of the jury. Whether the vessel was seaworthy, was peculiarly a question *of fact*. We cannot say that there is no evidence to sustain the conclusion to which the jury came ; and cannot, without interfering with their province, and violating a too well established principle, overrule their finding.

2. Another point taken by the defendant is, that the testimony of Thomas Callendar was improperly admitted. He testified, that he was an officer of the Sun Mutual Insurance Company, and sometimes acted as assistant secretary ; that, on the 22d day of August, 1846, he, for the company, paid the defendant



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Sherwood v. Ruggles.

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\$1237 55, in full for loss and general average on the cargo of the schooner *Cornelia*, as appeared from a receipt introduced, and signed by the defendant Ruggles. The ground on which the judge at the trial admitted this evidence, is correct. It was admissible to show, not that the defendant was liable, because he had received his insurance, but to show that he had acquiesced in and admitted the principles and results of the adjustment made by Johnson, the witness who made the adjustment.

3. Another ground taken by the defendant is, that the turpentine which is sought to be made contributory to the plaintiffs indemnity, was never delivered to the defendant, and therefore is not subject to general average. In *Strong v. The New York Firemens' Insurance Company*, (11 John. 323,) it is declared to be the duty of the master, in cases proper for general average, to cause an adjustment to be made upon his arrival at the port of destination; and it was held, that he has a lien upon the cargo to enforce payment of the contribution. Here, the schooner was necessarily detained at the port of necessity, for more than two months. The defendant becomes impatient, sends on a vessel, and brings away his property. Now, he contends, that the turpentine was not delivered to him according to his contract with the plaintiffs, and that it is not, therefore, subject to general average. The plaintiffs, surely, cannot by this agency of the defendant, lose his claim. The jury have found that there was no unreasonable or unnecessary delay in the port of Beaufort; and the defendant could not, by taking his property from there, when the schooner was being repaired, destroy the plaintiffs right to have contribution from it.

No error was committed on the trial, and the motion for a new trial is denied.

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Keutgen v. Parks.

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KEUTGEN v. PARKS.

Where an agent, entrusted with a negotiable note for the purpose of procuring it to be discounted, pledged it with a stranger for money loaned to him for his own use, at usurious interest ; *Held*, that the transaction being illegal, for usury, the lender could not retain the note against the true owner, on the ground that he had received the same in *good faith*, in the usual course of trade.

*Held* also, that the disposal of the note by the agent, was tortious.

The agent in such a case, is a competent witness for his principal in an action brought against the stranger for the recovery of the note.

The record of the principal's recovery, will not be evidence for the agent in a subsequent suit ; nor will he be liable to the principal for the costs, if the suit be unsuccessful. His interest is balanced, and the usury in the loan to him, does not alter the case.

Where a party who received a note, on a tortious misappropriation by an agent, but without notice of the owner's rights, sold it, and received the proceeds ; and the owner subsequently demanded the note of him without effect ; it was *held* to be sufficient evidence of a conversion.

An agent on receiving sundry notes to procure them to be discounted, furnished his post dated checks to his principal, intending to meet them with the proceeds of the notes when discounted. Before the date of the checks arrived, he pledged the notes for his own use ; and the checks were not paid. He subsequently paid the principal, a small sum, on account. In an action by the principal against the pledgee, for one of the notes ; *held*, that the agent, on tortiously disposing of the notes, extinguished any lien he may have had for his checks, and that no lien therefore passed to the pledgee ; and that the pledgee had no lien upon the note for the payment made by the agent.

A party calling a witness, may satisfy the jury from facts and circumstances stated by the witness himself, that he is mistaken in some of his statements and conclusions, while in others he is correct.

July 5, 6 ; July 15, 1848.

THIS was an action of trover for a promissory note for \$1593 94, made by Wood, Folger & Messer, to the plaintiff, dated April 13, 1845, and payable at six months.

Upon the trial, the following facts appeared :

For two years prior to April, 1845, one Ray, a note broker, had been in the habit of taking business paper from the plaintiff for the purpose of procuring it to be discounted. In some instances the arrangement was, for Ray to procure it to be dis-

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counted at a bank, and account for the proceeds, less his brokerage ; in others, he discounted the paper himself, taking it on his own account, and charging such commission as was agreed upon. In both modes, it was the practice for Ray, on receiving the paper, to hand his checks to the plaintiff for about the net amount, dated forward so as to conform to the time when the latter needed the avails, and to the time when Ray would probably be enabled to have the paper cashed, or otherwise to meet the checks.

On the 30th of April, 1845, the plaintiff delivered to Ray, to be discounted for the plaintiff's benefit, six notes indorsed by him in blank, and amounting in the whole to \$4526 17, including the note in question. The plaintiff desiring to use the proceeds on the 10th and 12th of May ensuing, Ray on receiving the notes, delivered to the plaintiff his three checks, two dated May 10th, for \$2000 and \$1800 respectively, and the other dated May 12th, for \$850.

It was a severely contested question of fact on the trial, whether the note in suit, and some of the others, were delivered to Ray as the plaintiff's broker, that he might procure them to be discounted ; or were discounted by Ray himself, being taken on his own account, and the checks given in payment for the same. This question was submitted to the jury, who found that the note in question was delivered to Ray as agent for the plaintiff, and not absolutely and as Ray's own property on a sale to him. It is therefore deemed unnecessary to state the testimony on this point at large.

The checks given by Ray, were never paid. The two largest were in the plaintiff's hands at the time of the trial ; the custody of the other was not shown.

Within three or four days after the 30th of April, Ray deposited the notes he had then received, with the defendant, who was the first teller in one of the city banks ; and on those notes as collateral security, received from the defendant \$2000, at the time he left them, and \$1500 the next day. By a long subsisting arrangement between the defendant and Ray, the former made short loans to Ray from time to time, bearing interest at the rate of one per cent. a month, on the deposit of securities ;

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*Keutgen v. Parks.*

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and if the loans were not paid at maturity, the defendant had the right to sell the collaterals and reimburse himself. The note in question was deposited with the others, and the advances made upon them, on the terms of this arrangement.

On the 23d of May, 1845, the defendant delivered the note in suit to a broker, with instructions to sell it for the best terms he could. The broker sold it on the 29th of May, and paid the proceeds to the defendant. On the 6th of June, the plaintiff demanded the note of the defendant, who replied that he did not hold it, and declined otherwise to answer the demand. Thereupon this suit was commenced.

It further appeared, that on the 12th of May, Ray paid to the plaintiff \$200, on account of the notes delivered to him on the 30th of April, and in a settlement made after this suit was commenced, between Ray and the plaintiff of matters prior to April 30th, and embracing three of the six notes then delivered, it was agreed that Ray should be refunded this \$200, whenever he settled for the other three notes, including the one in question.

On the trial, Ray was called as a witness on the part of the plaintiff, and was objected to on the ground of his interest in the event of the suit. The objection was overruled. After he had testified and stated the agreement between himself and the defendant, under which the notes were lodged with the latter, the objection to his competency was renewed, and was again overruled.

This witness testified, that when he left the notes in suit with the defendant, nothing was said as to the terms. That an agreement had been made as to terms, on his first dealing with the defendant, and that such course of business had continued as long as he dealt with the defendant. The plaintiff inquired what that agreement was. This inquiry was objected to on the ground, that proof of previous usurious loans, was not admissible to prove the loan upon this note usurious. The objection was overruled.

The defendant moved for a nonsuit, which motion was denied. The judge presiding at the trial, reserved the points of law arising in the case, and submitted to the jury on the evidence,

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the single question, whether the note in controversy was delivered by the plaintiff to Ray, as the absolute owner thereof on a sale to him by the plaintiff, or was delivered to him as the agent of the plaintiff for the purpose of being discounted for him. The jury by their verdict found that the note was delivered to Ray as the plaintiff's agent for discount, and not as owner, or on a sale.

The cause now came on for argument on a case.

*F. B. Cutting*, for the plaintiff.

*A. P. Man*, for the defendant.

BY THE COURT. SANDFORD, J.—The objection to Ray's competency as a witness for the plaintiff, was pressed with great earnestness on the argument, and if well founded, is fatal to the plaintiff's case; for he is the only witness to some facts without which the action cannot be maintained. It is said, first, that Ray, on the assumption that he was an agent and not the purchaser of the note, is liable to the plaintiff for the costs of the suit, in the event of the latter's failure. But this view of the matter is clearly erroneous. Whatever may have been the misconduct of an agent, it does not subject him to the costs of an unfounded suit, brought by his principal against a stranger, for the redress of the injury. (1 Greenl. Ev. § 396.) Next, it is urged that Ray is identified in interest with the plaintiff; a recovery by the latter will pay his debt incurred by the perversion of the note; that his interest is not balanced, because he has an absolute legal defence on the ground of usury, to any suit which the defendant may bring against him; and that the record in this suit, will be evidence in his favor.

As to these propositions, we say, first, that the record will not be evidence either for or against him. Such a consequence does not follow from his relation to either of the parties. Towards the plaintiff, he stands as a wrongdoer, in the disposal of the note. Towards the defendant, he becomes a debtor for the money advanced, on the plaintiff's recovering the amount of the note. If the plaintiff succeed in this action, and collect his

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judgment, and should then sue Ray for his conversion of this and the other notes, it is true Ray could show in mitigation of damages, that the plaintiff had received the amount of this note of the defendant; but he would prove it precisely as he could prove the same fact, if the latter on the demand of the note, had been satisfied that it belonged to the plaintiff, and had then paid him its proceeds.

It is an instance of balanced interest in the witness. (*Marshall v. Davis*, 1 Wend. 109.) Nor is this affected by the circumstance, that according to his testimony, the transactions between himself and the defendant were usurious. This was expressly decided by the late supreme court, in *Jackson ex dem. Skinner v. Packard*, (6 Wend. 415.)

The authorities cited by the defendant show, that where the whole credit on a sale is given to one person, acting ostensibly for himself, he is not a competent witness in behalf of the seller, to fix the whole or a part of the debt upon another, as a purchaser. They do not apply to a case where the witness is liable for the whole claim at all events, whether the one party or the other succeeds in the suit in which he is called. We have no doubt that Ray was a competent witness for the plaintiff.

The defendant also objected to testimony of the agreement between Ray and himself, as tending to show former usurious transactions between them. This testimony was admitted, not to prove other usurious transactions, but to show on what terms the note in suit was deposited; and as there was no express agreement made at the time, this could only be shown by proof of the original arrangement under which this affair took place.

On the merits of the case, the defendant claims protection as a purchaser of the note in good faith, for value. It is not alleged on the other side, that he had any notice of the fact that Ray was an agent and not the owner of the note; but it is insisted that the defendant received the note as security for an usurious loan, and that having taken it on a contract made in violation of the law, it was not received by him *in good faith*. This is a point of some moment, in the law of commercial paper. It will be observed that there was no *sale* of this note to the defendant. If there had been a sale, there would have been no

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difficulty. It is undoubtedly true, that the defence of usury is in general, personal to the party paying, or contracting to pay it. But the principle is not precisely applicable to this case. Here the defendant sets up against the true owner of a note, the great doctrine of the law merchant, that the holder of a negotiable bill or note, who has received it in good faith for value, before its maturity, may retain it against the whole world. Now the good faith, is a vital element of this doctrine. And can that be said to have been done *in good faith*, or in the usual course of trade, which is done contrary to the positive prohibition of a statute, and which the statute declares to be void? We are satisfied that it cannot. The principle is settled in *Ramsdell v. Morgan*, (10 Wend. 574;) and it is therefore unnecessary for us to argue the question at large. There an auctioneer made advances, on usurious interest, upon goods which had been fraudulently obtained from the owners. As he was ignorant of the fraud, he could have retained the goods against the owner, for his advances, provided they were made in good faith. But it was decided that the usury was fatal to his claim to be considered a *bona fide* purchaser.

The next ground of defence is, that the plaintiff did not show he was entitled to the immediate possession of the note, at the time he brought his suit; because Ray, by means of his checks and the subsequent payment of \$200, acquired an interest in the note, or a lien upon it.

As to this point, the \$200 may be laid out of view at once, because it was paid after Ray had parted with the note to the defendant. The giving of the checks does not affect the case. They were loaned by Ray, with the intention no doubt of paying them at maturity out of the proceeds of the plaintiff's notes, after he had procured them to be discounted. Being post dated, no one could take them prior to their maturity, as valid commercial paper. If they had been paid, it would have so far discharged the plaintiff's claim for the tortious disposal of his notes. But as they were not paid, they ceased to be of any importance. They availed nothing to the plaintiff, and if there ever were a lien in Ray's favor in respect of the checks, it ceased when he transferred the notes without providing for the pay-



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Koutgen v. Parks.

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ment of the checks. In short, the only pretence for asserting a lien by reason of the checks, is by connecting them with the notes as the mode by which the proceeds of the latter were to be paid to the plaintiff. And when that connection was severed by the wrongful disposal of the notes, so that their proceeds could no longer be used to pay the checks, there was no ground left for maintaining a lien.

But it is further insisted that the plaintiff, before bringing suit, should have tendered the checks and the \$200 to the defendant.

We will say nothing of the obstacles to this claim, arising from the facts that the three checks were given in respect of six notes, and the \$200 was paid on account of three notes; while this suit relates to one, which does not correspond in amount with that sum or with either of the checks; and the difficulty is not the fault of the plaintiff. But we go further, and say that we perceive no reason whatever for requiring the plaintiff to tender the checks to the defendant. As to the \$200, it was paid to the plaintiff on the 12th of May. Whatever rights or interests the defendant acquired in the note, were acquired at least a week before that time. He therefore had no interest in the \$200; which can be regarded only as a payment made by Ray on account of the plaintiff's claim against him for the amount of the notes.

If any further answer to the lien claimed were necessary, it might be added, that the defendant having parted with the note, no tender was necessary; and the lien, if one existed, would only avail him in mitigation of damages. (*Saltus v. Everett*, 20 Wend. 267.)

We have spoken of Ray's disposal of the notes as having been tortious. This is shown by *Murray v. Burling*, 10 Johns. 172. The exception mentioned by the court in that case, (on page 175,) does not apply, because, although here was a general authority to procure the note to be discounted, there was none to pledge it on usury for the agent's benefit. (And see *Reynolds v. Shuler*, 5 Cow. 323.)

This brings us to the point, that no conversion of the note by the defendant was proved. The facts proved were, that on the



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6th of June, the plaintiff demanded the note of the defendant, without obtaining it or its proceeds. The defendant's answer to the demand was, that he did not hold the note. This was true, for he had sold it, and received the proceeds a week before. The case of *Everett v. Coffin*, (6 Wend. 603,) is an authority that this was sufficient evidence of a conversion. Much of the defendant's argument, and most of his authorities on this point, are inapplicable, because his possession of the note was tortious from the outset, as against the plaintiff.

The only subject remaining to be examined, is the verdict of the jury on the fact submitted to them. It is said the testimony shows a clear and perfect sale of the note to Ray; that there was no conflict of evidence, and nothing to go to the jury; and at all events, the verdict is clearly against the weight of evidence. All the testimony on the subject was given by Ray, and is found in his statements and the papers which he produced. And it is very true that his direct statements were distinct and positive, that he purchased the note in question. There was, however, much developed in his occupation, in the nature and course of his business with the plaintiff, his cotemporary and subsequent acts, and the written memoranda; which indicated an agency, and rebutted the idea of a sale. The testimony was conflicting, and the judge would not have been warranted in withholding its consideration from the jury. He submitted it to them, with the instruction that a party calling a witness, was not bound by his testimony in all its parts; but might satisfy the jury from facts and circumstances stated by the witness himself, that the witness was mistaken in some of his statements and conclusions, while he was correct in others.

This instruction was perfectly correct in point of law, and was proper in this instance to prevent the jury from being misled by the familiar proposition, that a party cannot impeach his own witness.

We have considered the testimony, and find no sufficient cause for interfering with the conclusion of the jury. We are not prepared to say that we, as jurors, would have come to a different conclusion; much less can we say that there is any

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such preponderance of evidence as to authorize us to set their verdict aside.

The plaintiff is entitled to judgment on the case.

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ZACHRISSON v. AHMAN.

**Replevin** in the *detinet*, may be brought when the taking was tortious ; and that form of action does not admit the original possession of the defendant to have been lawful.

Where one claiming the right to bales of cotton on board a ship, for which bills of lading have been signed, demands the bills of lading, it is a sufficient demand of the cotton which they represent.

The charterer of a vessel cannot withhold goods for which the master has signed bills of lading to third parties, against *bona fide* assignees of such bills for value, on the ground that the property was his own, and the bills should have been signed to him.

A general clerk of a merchant, who transacts the out-door business of the latter, negotiates purchases and charter parties in the name of and ratified by his principal, and prepares and presents bills of lading for signature on shipping property of the principal ; has no authority as such clerk, or as commercial agent, to pledge such bills of lading, or to receive advances on the faith thereof.

Such a chief clerk is in no sense a factor, nor is he entrusted with the possession of bills of lading, within the factor's act of 1830. That statute was intended to protect advances and dealings made on the faith of the ownership of the property, and not on the faith of the possession of the paper title, or the evidences of title.

July 17 ; July 27, 1848.

**REPLEVIN** in the *detinet*, for two hundred and twenty-one bales of cotton, and for the bills of lading issued for the same cotton ; one set being for 136, and the other for 85 bales ; tried before SANDFORD, J., June 8th, 1848.

On the trial, it appeared that the plaintiff, a Swedish merchant in New York, in December, 1846, departed for South America, leaving his affairs generally in charge of F. Wissman, a German merchant, in whose counting room the plaintiff kept his office. On his departure, he gave to his clerk, M. A. Suber,

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also a Swede, certain written instructions, among other things authorizing Suber to open all his letters, to forward family and private letters to him; and regarding his business letters as to European affairs, to "do the needful, and communicate their contents to Mr. Wissman, whom you are aware holds my procuration for transacting them." As to business letters connected with the house in South America, Suber was to take copies and leave with Mr. Moring, who was to attend to those matters. As to letters from two merchants in Venezuela, Suber was to leave them unanswered, unless some business matter required prompt action, when he was advised to consult Mr. Moring; though if any signature were requisite, Mr. Wissman would have to attend to it. Suber was to correspond with the plaintiff constantly respecting business. Mr. Wissman would furnish Suber the trifling means for office expenses. There were instructions as to keeping the books. "In shipping goods on my own account, you will select such as are cheapest, most suitable, and which promise best according to former shipments and advices, making out accounts to guide Mr. W. in his opinion." Then followed specifications, as to various articles of commerce, among which,—“Cotton. For the purchase of this, Mr. B., &c., is the most reliable person to intrust with the purchase of a given description, if you are not judge enough yourself. Yet Mr. L., cotton broker, &c., would also do you justice, if left to him.” Further on, “Samples of suitable cottons are also at the store for your government.” Speaking of tobacco, the instructions say,—“Before ordering from Baltimore and Richmond, it will be necessary previously to obtain the prices, so as to enable you to calculate if the price here would be within limits.” Towards the conclusion,—“Of course, in all these matters of purchases, charters of vessels, and every thing connected with the Swedish and European trade, you will always consult Mr. W., who will advise you, as he is responsible to me for a good and faithful execution of the trust I have placed in his hands by means of my procuration.” The power to open letters, was to devolve on Wissman’s clerk, Schenckberg, if any thing should happen to Suber. These instructions were volu-

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minous and minute, and generally of such a character as would be addressed to a merchant's chief clerk.

The authority from the plaintiff to Wissman, was a full letter of attorney under seal; accompanied with a letter of instructions, as minute and nearly as long as those given to Suber. The letter of attorney authorized Wissman to superintend, manage and conduct, all the plaintiff's business transactions and correspondence, to and with all persons and places in Europe; to receive and execute orders and commissions; to draw and accept bills of exchange; to make entries and give bonds at the custom house; to effect insurances and charter parties; and to make contracts for the purchase and shipment of goods on the plaintiff's private account. The instructions requested Wissman to consult with Suber as to shipments for private account and upon orders; and stated Suber might purchase, guided by W.'s experience and advice. They requested W. to place at Suber's disposal, sums not above \$10 to \$15 at a time, for counting house expenses.

In March, 1847, Wissman, acting for and in the name of the plaintiff, chartered from the house of Grinnell, Minturn & Co., in New York, a Swedish barque, of which they were the agents, to take a cargo of cotton for the plaintiff from New York to Gothenburg in Sweden. The defendant was the clerk in the house of G., M. & Co., intrusted with the business of chartering vessels, and as such, called on Wissman, and proposed to him the charter of the vessel, and stated the terms. After two or more conferences, and considering the terms, W. instructed Suber, (who attended to the plaintiff's out-door business as clerk,) to take the barque for the plaintiff. Thereupon G., M. & Co., prepared a charter party, dated March 27, 1847, between them as agents of the first part, and the plaintiff of the second part, chartering the barque on the terms stipulated, and sent it, under cover to Suber, to Wissman's office. Suber examined it, and in plaintiff's name returned it as correct, upon which G., M. & Co., executed it, and sent it again to W.'s office, who signed it in the plaintiff's name as his attorney, and Suber attested his signature as subscribing witness. Before the formal charter party was prepared, Suber, in the name of the plaintiff,

signed at G., M. & Co.'s office, a brief memorandum of the terms which had been agreed upon, drawn up by the defendant. The plaintiff and his agents were, by the charter, to have the entire freighting of the barque.

Wissman, with Suber's aid as clerk, in the month of April, 1847, bought, paid for, and shipped for the plaintiff, on board the barque, 1189 bales of cotton. There were among others, one lot of 136 bales, and one of 85 bales. Suber filled up the bills of lading for all the cotton so shipped, and left them with the defendant at the office of G., M. & Co., to have them signed by the master. Bills of lading for the 85 bales were signed and delivered to Suber, who kept them in his desk for a few days, and then pledged them to the defendant for money borrowed of him in the name of the plaintiff. These bills of lading were made out to the order of Mr. C. F. Carlborn of Gothenburg. Suber afterwards made out new bills of lading for the 85 bales, in the name of the defendant, and left them with him to be signed by the master, for his security for the loan of \$3000, about half of which had then been advanced. The master signed these, on the former being given up. When Suber left the bills of lading for the lot of 136 bales with the defendant for signature, (which was after the delivery of the bills for the 85 bales as security,) he borrowed of the defendant further sums of money, and pledged those bills of lading as security for the loan. He received in all, \$6000 in different sums, from the defendant, on the security of the two lots of 85 and 136 bales. For the 136 bales, Suber never had in his possession the bills of lading after they were signed.

In purchasing the cargo for the barque, Wissman bought some lots personally, but nearly all were purchased by S. upon consultation with W. Purchases in a few other instances, for shipment by other vessels, were contracted by Suber without consulting W., but were afterwards approved by him.

When Suber obtained the money of the defendant, he represented to the latter that he wanted to use it for the plaintiff, to pay for cotton already bought to go by the barque. He told the defendant it was not best to mention the loan to any one, as it would be disagreeable to Wissman to have it known. That

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W. was not willing to advance money for the purchases before he could draw against the shipments, and so refund himself.

In fact, no part of the money received by Suber from the defendant, was applied to or for the use of the plaintiff; but it was spent by Suber. When he left the bills of lading for the 85 bales with the defendant to be signed, he left the barque's receipts for that lot; and when he left the bills for the 136 bales with the defendant as security, he left the receipts for that quantity. The bills of lading left for the 136 bales, were in blank as to the consignee, and so made for the defendant's security. Wissman knew nothing of these transactions with the defendant till the last day of April, and he never received bills of lading for those two lots of cotton. On calling for them from Suber, he was at first put off; and the next day Suber confessed that he had pledged them with the defendant for advances, and lost the money in gambling. W. then demanded the bills of lading of the defendant, who admitted they were in his possession, but refused to deliver them up. W. proposed to give him security that his rights, if any, should not be affected by delivering the bills to him, but he still declined.

There was some testimony in defence, tending to show that after the plaintiff's return from South America, in July, 1847, he disclaimed the purchase of the 136 bales; but W. testified they were bought for the plaintiff's account.

It was proved, that Suber appeared to have the superintendence of the cotton for the barque while it was being pressed and loaded.

For all the residue of the cotton shipped by the barque, the bills of lading were delivered to Wissman. After the discovery of Suber's misconduct, the master was called upon by W. to sign bills of lading for the 85 and 136 bales, which he refused to do, because he had already signed bills for the same.

The checks in which the defendant advanced the \$6000 to Suber, were ten in number, dated from the 14th to the 27th of April, in amounts from \$300 to \$1500.

The value of the two lots of 85 and 136 bales, at the time of the demand, was \$10,551 10.

The defendant, on the evidence being closed, requested the

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judge to instruct the jury, that under the documentary evidence adduced on the trial, Suber was authorized to act as the factor or commercial agent of the plaintiff; and that, as such factor or commercial agent, he was authorized to pledge bills of lading in his hands, for money advanced or negotiable instruments given to him thereon by the defendant in the course of business. The judge refused to give the instructions requested, and the jury rendered a verdict for the plaintiff.

*J. L. Wendell*, for the defendant.

*F. B. Cutting*, for the plaintiff.

BY THE COURT. OAKLEY, CH. J.—The defendant contends, that he has a right to hold the bills of lading and the cotton in question, for the advances which he made to Suber; and the principal question in the cause, is whether he has that right.

The plaintiff was indisputably, the owner of the whole of this cotton. The question of fact as to his ownership of the parcel of one hundred and thirty-six bales, was submitted to us on the evidence contained in the case. We have examined the evidence, and have no doubt on the subject.

The first objection made to the plaintiff's recovery, is that there is no proof of any demand of the property from the defendant before the commencement of the suit; and that a demand was necessary, because it came lawfully into his possession. That the bringing of replevin for the unlawful detention of property, is of itself an admission that its original possession by the defendant, was lawful and not tortious.

There are two answers to this objection. 1. The cases to which we were referred by the plaintiff's counsel, viz.; *Cummings v. Vorce*, (3 Hill, 282;) *Pierce v. Van Dyke*, (6 ibid. 613;) and *Stillman v. Squire*, (1 Denio, 327;) establish the position that replevin in the *detinet*, lies where the taking of the property was tortious, as well as in cases where the wrong consists in its detention only.

2. Another answer is, that a demand was proved. The plaintiff's agent, Mr. Wissman, demanded the bills of lading of



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these two parcels of cotton, from the defendant. The bills of lading were the representatives of the cotton, the evidences of the title to the property ; and a demand of those evidences, was a demand of the cotton represented by them, and must have been so understood by the defendant. The demand is therefore held to have been sufficient.

Next, it is insisted by the defendant, that the plaintiff as charterer of the vessel, was *pro hac vice* the owner, and could hold the cotton laden on board of her, and need not deliver it upon the bills of lading, to the defendant or the assignees of those bills ; and that he could remove the captain of the ship, if he were obstinate and refused to withhold the cotton on the plaintiff's order to retain it.

This, we must say, is no ground at all. The captain had issued bills of lading for these two lots of cotton, to the defendant and his assignees ; which enabled the defendant to dispose of the property to others in good faith for value, by a mere indorsement of the two bills, who could demand the cotton from the master of the ship, whoever he might be, and could hold it by virtue of the bills of lading against any direction or control of the plaintiff ; and it is very likely the defendant had so parted with the bills, before any knowledge of the difficulty came to the plaintiff's agent.

The main question in the cause, is whether the defendant can hold the cotton for his advances, as against the true owner. And in considering the question, we are to regard the advances as having been made in good faith.

It is said, that Suber was the general commercial agent of the plaintiff, and thereby authorized to pledge or dispose of this property for the advances made by the defendant. And further, that he was, as agent, entrusted with the possession of the bills of lading ; and his contract, pledging the bills to the defendant, for the payment of the money advanced to him by the defendant, was valid, and barred the plaintiff from a recovery.

On this subject, it is clear that the plaintiff's letter of instructions to Suber, affords no pretence for the authority ascribed to him as the plaintiff's general or commercial agent. Those instructions are very limited in their character. They doubtless



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Zachrisson v. Ahman.

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grew out of the fact that Suber, as well as the plaintiff, was a Swede, and Wissman, the plaintiff's agent, was a German, unacquainted with the language in which much of the plaintiff's foreign correspondence was conducted; and it thus became necessary to have it interpreted to Wissman; and Suber was therefore deputed to receive and examine the plaintiff's letters, keep those which were of a private nature, and furnish to Wissman the contents of the business letters.

The case furnishes no evidence of a general authority in Suber to act for the plaintiff, or of any acts of Suber which were known to the defendant, from which he could infer that Suber had such authority.

The other ground upon which the defence is attempted to be sustained is, that Suber was in possession of the bills of lading of the cotton, having been entrusted with the same; and that he could dispose of them under the act of 1830, relative to factors, &c., to the defendant acting in good faith, on the strength of such possession.

This ground, in our opinion, entirely fails. A clerk is not within the statute at all. Suber was not a factor in any sense of the word, or an agent for the sale of this property. He had no control at all of the cotton, nor was he entrusted with the possession of the bills of lading, in any other manner than any clerk or porter is entrusted to whom bills of lading are handed to be carried from a shipper's office to the master, or *vice versa*. Indeed, if Suber had been a factor, the defendant could not hold the cotton for his advances, because he knew from the bills of lading, that Suber was not the owner of the property. The act of 1830 was made for the protection of those who dealt with a factor in ignorance of his not being the true owner. This is well settled by the case of *Stevens v. Wilson*, (6 Hill, 512, and in error, 3 Denio, 472,) cited by the plaintiff's counsel. The statute was intended, (as this case decided,) to protect advances and dealings made on the faith of the ownership of the property, and not on the faith of the possession of the paper title, or the evidences of title.

In this case, if Suber were to be deemed a factor of the plaintiff, yet the defendant knew, or ought to have known, that he

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was not the owner of the cotton. On this point also, there is no room for doubt; and we must give judgment for the plaintiff for the value of both parcels of cotton.

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CHILD and others v. THE SUN MUTUAL INSURANCE COMPANY.

An abandonment of a cargo insured, in order to be effectual, must be warranted by the state of things actually existing when it is made. And if made on information warranting an abandonment, and was not accepted when made; it will not be valid, if it afterwards appear that such information was erroneous, and there was in fact no technical total loss.

So, where a whaling vessel was stranded and lost, and on receiving information of the disaster, the owner of the vessel and cargo gave notice of abandonment to the underwriters; and, after subsequent advice of the safety of part of the cargo, gave a further notice of abandonment; but prior to the first notice, nearly the whole cargo had been saved, and had arrived at an intermediate port; and there had been no notice or act on the part of the underwriters accepting the abandonment; it was *held*, that it was not a valid abandonment of the cargo, and that the profit arising from a sale of the saved portion of the cargo, and the investment of the proceeds in coffee, at the intermediate port, belonged to the assured, who were entitled to claim for a partial loss.

July 14; July 27, 1848.

ASSUMPSIT, on a policy of insurance on the cargo of the whaling ship Galen. The ship sailed from Warren, Rhode Island, in December, 1842. On her return home, in February, 1846, she was stranded at Fox Bay, in the Falkland Islands, and was totally lost. At that time she had on board 327 barrels of sperm oil, 1400 barrels of whale oil, and 8 barrels of black fish oil. The cargo was almost all saved, subject to various expenses, and was shipped to Rio Janeiro, where it arrived previous to September 17th, 1846.

On the 19th of September, 1846, the plaintiffs having received a report of the stranding of the Galen, addressed from Warren, R. I., to the defendants and the other underwriters on the vessel and cargo, a letter stating the report, that there was no probability of her being got off, and thereby abandoning the vessel and cargo to the insurers, claimed for a total loss as insured.

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Prior to November 16th, 1846, the plaintiffs received from their agents at Rio Janeiro, Maxwell, Wright & Co., a letter, stating the arrival there of the captain of the Galen, that he had shipped to Rio some 350 casks of whale and sperm oil, which had arrived to the consignment of a grocer there, and were sold conformably to the U. S. Consul's instructions, at the fair rate of 1250 reals per gallon. That the captain would have the proceeds paid over to M., W. & Co., but as the oil was subject to very heavy charges, they could not as yet make any correct estimate of its probable amount. That the captain had to consign to the grocer, in order to procure the vessel in which it came. And that M., W. & Co. would have made the necessary documents for the underwriters, and keep the plaintiffs advised of the business.

On receiving this communication, the plaintiff's at Warren, wrote another letter to all the insurers of the Galen and cargo, dated November 16th, 1846, in these words :

" Since our letter of the 19th Sept., advising of the abandonment of the ship Galen and her cargo to the insurers, we have received intelligence confirming the rumor of the loss of said ship, upon the strength of which said abandonment was made.

" We have now to advise the entire loss of the Galen, at Fox Bay, Falkland Islands, in February last, and the shipment of the portion of the cargo which was saved, to Rio Janeiro, where it had arrived previous to Sept. last, and 300 barrels sperm oil has been re-shipped to N. York, and the balance, whale oil, having been sold at Rio, (at a very fair rate,) the proceeds (amount unknown,) will be remitted in coffee to N. Y., consigned to us.

" We desire to know what disposition you will have made of this property, and unless advised to the contrary, we shall immediately, upon its arrival in this country, dispose of it for the benefit of all concerned.

" The sperm oil comes forward in the brig Camilla, and the coffee in the brig Louisa Beaton, both which vessels would probably sail about the first October, from Rio, as we are advised by Messrs. Maxwell, Wright & Co., of that city, and presuming

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you will prefer risking your interest in the property, we shall not effect insurance upon it, unless requested so to do.

“ N. B.—The protest has not yet come to hand.”

All the oil, except the sperm, was sold at Rio, and the proceeds paid by the master, to Maxwell, Wright & Co., who invested the same in 1252½ bags of coffee, and shipped the coffee to New York and Boston, on the 5th and 20th of October, 1846, consigned to the plaintiffs. They forwarded to the latter, their account current with the captain for the ship's owners, and an invoice of the coffee. The plaintiffs received the coffee, sold it, and retained the proceeds. There was a profit on the sale of the coffee. The sperm oil saved, being about 300 barrels, was shipped to New York, and also came to the hands of the plaintiffs.

On the 2d of January, 1847, the plaintiffs delivered to the defendants, the preliminary proofs of interest and loss. On the 20th of July, 1847, at New York, they addressed a letter to the defendants, as follows :

“ To avoid misunderstanding on the subject of the preliminary proofs in the case of the Galen cargo policy, we beg leave to draw your attention to the proofs of interest and of loss delivered to you, namely, a copy of the register lately delivered, a protest and survey delivered in January last, copies from the captain's journal of the cargo on board, bills of lading from the Fox Islands, by the Dispatch, July 23, 1846, of 173 casks oil ; by the Manney, July 31, 1846, of 265 casks oil, to Rio de Janeiro ; and the bills of lading of coffee, proceeds of said oil, by the Louisa Beaton, October 6, 1846, for 474 bags ; by the Pilgrim, for 778½ bags, October 20, 1846 ; together with all the bills, accounts, sales and invoices, with the statement of loss, by Welbaskie & Graham, of our claim.

“ These were all delivered in February last, at your office, and to them we shall refer as preliminary proofs of interest and of loss, as far as they may be material, of which please to take notice. The papers are left with our attorney, D. Lord, where they may be consulted, if need be.”

The various documents relating to the adventure being laid

before *despecheurs* by the plaintiffs, they made a statement of the plaintiff's claim, by which it appeared, on the fifth February, 1847, to be \$2,135 87.

If the insurers were entitled to the benefit of the profit on the sale of the coffee, in which the proceeds of the oil sold at Rio, were invested, it was agreed that this statement of the loss was incorrect. Otherwise, it was admitted, for the purposes of the trial, that the statement was correct, subject, however, to adjustment.

There was no proof of any express assent of the defendants to the abandonment, nor of any act indicating their acceptance of the same.

The defendants insisted that the plaintiffs having abandoned the cargo to them, they, from that time, became substituted in the plaintiff's right to the property, or its proceeds, or reinvestments, according to the proportion covered by their policy.

The plaintiffs insisted that the letters of 19th September, and 16th November, 1846, respectively, did not show a valid right to abandon, and also, that at each of those dates, the property insured had been relieved from the peril on which the attempt to abandon was predicated, so that the letters of abandonment were not effectual, and therefore the underwriters were not entitled to the substitution by them claimed.

A verdict was taken subject to the opinion of the court.

*D. Lord*, for the plaintiffs.

*H. Ketchum*, for the defendants.

BY THE COURT. VANDERPOEL, J.—This case is somewhat peculiar. The defendants seek to hold the plaintiffs to their abandonment of the cargo, which forms the subject of the action, and insist that the plaintiffs having abandoned the property to them, they, from that time, became substituted to it or its proceeds in the plaintiff's right, according to the proportions covered by their policy.

The plaintiffs, on the other hand, insist, that the letters of the 19th September, and November 16, 1846, respectively, did not

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show a valid right to abandon, and also, that at each of those dates, the property insured had been relieved from the peril on which the attempt to abandon was founded, so that the abandonment was not effectual, and, therefore, the underwriters were not entitled to the substitution claimed by them.

The whole case depends upon the legal effect of the attempted abandonment.

When the assured makes an abandonment, and the underwriter accepts it, it is binding on the parties. So far as it respects the rights of the assured, an acceptance of the abandonment is not necessary. If made in due form, and for sufficient cause, it transfers the subject, and perfects the right of the assured to recover for a total loss, although it is not accepted by the insurers. (2 Phillips on Ins. 400.) The underwriter is not construed by his silence merely, to accept the abandonment. He is not bound, says Justice Story, in *Peele v. Merchants Insurance Co.*, to signify his acceptance. If he says nothing and does nothing, the proper conclusion is, that he does not mean to accept. (2 Phill. 401.)

The two letters of abandonment were written in Rhode Island, when the plaintiffs could not have known the real facts, as they were afterwards shown to have existed. It is a well established rule, that the right to abandon, is to be tested by the actual facts at the time of the abandonment, and not upon the state of the information received. (3 Kent's Comm. 325; *Church v. Bedient*, 1 Caines' Cases in Error, 21; *Depau v. Ocean Insurance Co.*, 5 Cow. 63; *Dutilh v. Gatliff*, 4 Dallas, 446; 2 Wash. C. C. Rep. 54.) The assured may act upon the best information they can get, as to the state of the vessel or the cargo, but as Chancellor Lansing said in *Hallett v. Peyton*, (1 Caines' Cases in Error, 40,) "if the information is either totally unfounded or materially variant from the truth, it would be a strange position to maintain, that its resemblance should be preferred to the truth itself." There must be an actual total loss, or one in the highest degree probable, to justify an abandonment of the cargo. (*Anderson v. Wallis*, 2 Maule & Sel. 240; *Hunt v. Royal Exchange Assurance Co.*, 5 ibid, 47; 2 Camp. N. P. 624.)

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We are of opinion, that as the defendants did not accept the abandonments made by the plaintiffs; and the facts subsequently discovered, showed there was no ground for it; they did not acquire the plaintiff's right to the oil, or its proceeds or re-investments. The judgment must be, as for a partial loss; as there was no binding abandonment of the property to the defendants.

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**THE PEOPLE v. FALCONER and DOWNING, impleaded with SACKETT and another.**

In a suit upon an administrators bond, the sureties will not be permitted to deny that the surrogate taking the bond and issuing the letters of administration, had jurisdiction of the case.

It is not necessary in the declaration to set forth the service of the various processes, and the minute and formal proceedings, preliminary to the making of each order or decree by the surrogate.

A count stating the issuing of the letters, the execution of the bond, that the administrators became possessed of assets, that they were required to account by an order of the surrogate, and did account before him, that he decreed a balance in their hands, and ordered it to be paid over to the distributees in specified sums, that the administrators neglected to pay and to comply with the orders whereby the bond was forfeited, and that the surrogate by an order directed it to be prosecuted; was held sufficient on general demurrer.

It was also held that the count need not aver an application by the distributee to the surrogate to have an order made for prosecuting the bond.

July 14th, July 27th, 1848.

**DEMURRER** by the sureties, in an action of debt on an administrators bond. The declaration set forth, the execution of the bond in the city of New York, by J. Raymond, W. H. Sackett, and the defendants, Downing and Falconer, dated May 27th, 1844, with a condition, that if J. Raymond and Sackett should faithfully execute the trust reposed in them, as administrators of all and singular the goods, chattels and credits of Henry Raymond, late of Woodbridge, in the state of New Jersey, deceased, and should obey all orders of the surrogate of the

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county of New York, touching the administration of the estate committed to them, then the obligation was to be void. The declaration next averred, that after the execution of the bond, and on the same date, letters of administration were issued accordingly to Sackett and J. Raymond, by the surrogate of New York. It then assigned breaches, first, that Sackett and J. Raymond, or one of them, converted to their own use, assets of the estate of the intestate, which came to their hands as such administrators, to the amount of \$4000, in violation of the trust so reposed in them.

Second. That after the execution of the bond, and after the expiration of eighteen months, the administrators were required to render an account of their proceedings, by an order of the surrogate of the county of New York; and that thereupon they did account before such surrogate, in September, 1846. That such proceedings were had upon such accounting, that the surrogate adjudged and decreed, on the 16th of September, 1846, that Sackett, one of the administrators, had in his hands of the assets of the estate of H. Raymond, a balance of \$1986 40, and by the same decree, the surrogate ordered Sackett to pay one-third of such balance, being \$662 13, to Fanny Raymond, the widow of the intestate, as and for her distributive share of the estate. That Sackett has not obeyed the order, and he has not paid that sum to Mrs. Raymond.

Third. That the surrogate, at the same date, made another decree, by which he ordered Sackett to pay to James Raymond, two-thirds of the balance so decreed against him, being \$1324 26, which he has also omitted to do. By reason of which breaches, the bond became forfeited.

Fourth. That thereupon, on the 30th of January, 1847, the surrogate of the county of New York, did order and direct the bond to be prosecuted; and according to the *provisions* of the statute, an action has accrued to the plaintiffs, &c.

The defendants, Downing and Falconer, demurred to the declaration on various grounds, which are mentioned in the opinion of the court.

*F. Tillou and J. L. White, for the defendants.*



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*Jon. Miller*, for the plaintiffs.

BY THE COURT. SANDFORD, J.—The first ground of demurrer is, that the declaration fails to show that the surrogate of New York had jurisdiction of the administration of Henry Raymond. It appears that he was domiciled in New Jersey, and there is no allegation that he left assets in this city.

We think a very plain answer to this objection is to be found in the bond executed by the parties, in which they became bound for their principal's faithful execution of the trust reposed in them as administrators under the appointment of the surrogate of the county of New York, and for their obedience to all his orders touching such administration. It would be strange indeed, if the sureties in an administration bond, after enabling their principal to possess himself of the personal estate by its execution, should be permitted to avoid its obligation, upon the plea that the officer granting the letters and receiving the bond, had no jurisdiction of the subject matter. The execution of the bond precludes both principals and sureties from gainsaying the surrogate's jurisdiction, in any proceedings for the assets which the appointment and bond have enabled the principal to receive. (See *Pritchett v. The People*, 1 Gilman's R., Illinois, 525; *Morse v. Hodsdon*, 5 Mass. 314.)

It is sufficiently averred in the declaration, that letters of administration were issued to Sackett and James Raymond, and that by virtue of those letters, they received a large amount of assets of the intestate.

The next objection, which embraces several specifications in the demurrer, is that the declaration does not show the facts necessary to give the surrogate jurisdiction to have made the orders to account, to pay over, and for the prosecution of the bond.

The defendants attorney seems to have supposed, that it was necessary to set forth in the declaration, every minute step in the proceedings before the surrogate; each application to him, the issuing and service of process, the proof of service, the date

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and place of each act, that the orders were in writing and were entered of record, and even the filing of the papers.

In this the attorney was clearly wrong. The surrogate, having jurisdiction of these administrators, and of the administration committed to their charge; it was sufficient for the plaintiffs to set forth, as they have done in this court, that the administrators were at the proper time required to account, that they did account before the surrogate, that he found and decreed the balance in their hands, that he further decreed the distribution of such balance, and payment to the respective next of kin, that the administrators failed to comply with such decrees, that thereby the administration bond was forfeited, and that the surrogate thereupon ordered it to be prosecuted.

It was not necessary that the declaration should aver notice to the sureties of any of these proceedings. And it would have been very reprehensible in the plaintiff to have set forth a quarter of the matters, the omission of which is assigned as cause of demurrer.

If any grounds exist for impeaching the proceedings, either in respect of the sums decreed to be paid, or in any other matter open for consideration in this suit; the sureties may avail themselves of it by their plea and notice.

That the declaration is sufficient, we have no doubt. The cases of *The People v. Dunlap*, 13 Johns. 437; and *The People v. Barnes*, 12 Wend. 492, show this inferentially, from the pleadings in the former, and the points raised in the latter.

It is said that the declaration should have stated an application to the surrogate to have the bond put in suit, either by a creditor, a legatee, or one entitled to a distributive share—as no others could apply, and the order could not be made except on such an application.

On this point, we think that there being shown a case in which the surrogate might direct the bond to be sued, and in which he would be required so to direct on the application of one entitled to a distributive share; and it being further shown that the surrogate has in fact made an order that the bond be prosecuted; it is to be taken that such order was rightfully made. His jurisdiction of the subject matter, founded on the

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administration, the account and order thereon, the distribution, the order to pay to the parties entitled, and the omission to pay, entitles the order to sue the bond, to be treated presumptively, as a valid judicial act, without the averment of a formal application or the service of a citation or order to show cause.

Upon the whole, we are satisfied that the count is sufficient, and the demurrer must be overruled, with leave to the defendants to plead on the usual terms.

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J. G. SMEDBERG, Administrator, &c., of C. G. SMEDBERG v.  
SIMPSON.

The possession of an usurious note by the indorsee, is presumptive evidence that he received it before it became due, for a valuable consideration, without notice of the usury.

Where a new security is given to such a *bona fide* holder of an usurious note, by one of the parties thereto, after it became due ; it was *held* to be valid, notwithstanding the holder of the usurious note was apprised of the usury therein, after he became its holder, and before the new security was given.

July 13 ; July 27, 1848.

**ASSUMPSIT** against the defendant, as the indorser of a promissory note made by Edwin Wilcox, payable to and indorsed by F. Whittlesey, for \$1297 45, dated January 11, 1844.

At the trial, before the Chief Justice, in November, 1847, the defendant proved that this note, and one of \$3000, were given by the maker to C. G. Smedberg, about the 30th January, 1844, in settlement of two notes for \$2000 each, then held by Smedberg. Those two notes originated in large loans made in 1842, by one Halliday, to a house in which Wilcox was a partner ; and were made by Wilcox in 1843, were indorsed by Whittlesey, and were delivered to Halliday on account of the loans so made in 1842. When the two notes fell due, they were held by Smedberg, and were protested for non-payment. In December,

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1843, Smedberg issued an attachment against Whittlesey, on the two notes, as a non-resident debtor, and the sheriff levied on bank stock of W. valued at about \$3000. Wilcox arranged to have the attachment settled and discharged, by giving to Smedberg the note in suit, and a note for \$3000, the two making the amount of the two \$2000 notes, with the interest and costs of the attachment; and thereupon those notes were given up to Wilcox, and the attachment was discharged. The stock was pledged to secure the note of \$3000. The defendant indorsed the note in suit at the request of Wilcox.

The defendant then offered to prove, that the loans made by Halliday to Wilcox's firm were usurious, and that the two notes of \$2000 each were usurious. The plaintiff objected to the evidence, and it was excluded by the judge.

The defendant then proved by Wilcox, that during the negotiation of the settlement of the attachment proceedings, he informed both Smedberg and his attorney, that those two notes were usurious. The defendant then renewed the offer to prove the usury in those notes, and in the original transaction; insisting,

*First.* That on making the proof thus offered, the plaintiff could not recover upon the note in suit, as his intestate took it with notice that the two notes of \$2000 each, were usurious.

*Second.* That on making such proof, the plaintiff could not recover, without proving that his intestate took the two notes of \$2000 each, for a valuable consideration, and without notice at the time that they were usurious. The judge decided, that the evidence was inadmissible, and excluded the same. The counsel for the defendant excepted to these decisions of the judge.

The cause was submitted to the jury upon other questions involved, and they rendered a verdict for the plaintiff for the amount of the note. The defendant moved for a new trial.

*J. S. Bosworth*, for the defendant, relied on *Chapman v. Black*, (2 Barn. & Ald. 588;) *Powell v. Waters*, (8 Cow. 692, 695, per Jones, Chancellor, and Colden, Senator;) and *Morgan v. Tipton*, (3 McLean, 339.)

*J. W. Gerard*, for the plaintiff.

BY THE COURT.—It was decided by the assistant vice-chancellor, in respect of the note for three thousand dollars, given at the same time with the note in question, that the law derived a presumption from Smedberg's possession of the two notes of \$2000 each, that he had received them before they became due for a valuable consideration, and without notice of the usury. (*Smedberg v. Whittlesey*, 3 Sandf. Ch. R. 320.) He also held, that the giving of the new notes, without objecting to the validity of the former, was of itself an admission that Smedberg was a *bona fide* holder of the old notes, without notice of their usurious character. Smedberg recovered in the chancery suit, on the well settled principle, that where a party to an usurious note or bill, gives a new security for it to one to whom it has been transferred for a valuable consideration, without notice of the usury, the new security is valid, although the holder could not have recovered on the note or bill.

We concur fully in the decision of the assistant vice-chancellor. This case differs from the one decided by him, in the single fact that it is here proved, that Smedberg knew the parties alleged the \$2000 notes to be usurious; not when he received them, but after they became due, and before he received the new securities given in their stead. We are unable to perceive how this affects the case. The principle on which such new securities are upheld is, that the holder of the tainted bill or note, is innocent of the illegality connected with it, and if prevented from recovering it, will suffer loss without any fault on his part. It is morally just that he should be paid, and this forms a sufficient consideration to support a new security made by a party to the usurious obligation. Now, the justice of his claim for payment, rests upon his ignorance of the usury when he received the usurious paper. It is no less just because he afterwards hears of the usury. Notice of it then comes too late to affect his situation. It cannot restore to him the consideration which he paid for the security. It does not make him any the less a *bona fide* holder for a valuable consideration.

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As to *Chapman v. Black*, cited by the defendant, we are not disposed to attach much weight to it, for the reason that in its ruling anterior to the point to which it is cited, it is adverse to our own decisions. Thus, *Chapman v. Black* holds, that a business bill of exchange, sold at less than its face, and paid for partly in cash, and partly in usurious notes of the seller, is void for usury, in the hands of the buyer. Our courts hold, that no rate of discount on such a transaction can make it usurious, provided it be an actual sale. (*Cram v. Hendricks*, 7 Wend. 569 ; *Powell v. Waters*, 8 Cow. 696, per Colden, Senator.)

We were also referred to the opinions of Jones, Chancellor, and Colden, Senator, in *Powell v. Waters*, as showing that the holder of the usurious security, must remain ignorant until after he obtains the new security, in order to render the latter valid. But we do not so understand those opinions. They seem to us clearly to refer to his ignorance when he receives the original tainted security. This is very evident from the converse of the proposition, as stated by Senator Colden, at page 696.

We have no doubt that the ruling at the trial was right, and the motion for a new trial must be denied.

**BEIRNE AND BURNSIDE v. DORD.**

On a sale of goods by sample, there is an implied warranty that the bulk of the goods is equal to the sample in quality and soundness.

This is an exception to the principle of *caveat emptor*, which is the governing rule as to sales in general.

In order to warrant a jury in finding that a sale was a sale by sample, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both seller and buyer mutually understood they were dealing with the sample, and with an understanding that the bulk was like it.

An opportunity for a personal examination of the bulk, is a strong circumstance against considering the sale to have been made by sample.

A general and uniform usage in a particular trade, in goods so packed or situated that examination of the bulk is inconvenient and difficult, or calculated to expose the goods to injury, to the effect that the goods in that trade are sold by the production and examination of samples; is competent in connection with other evidence, to prove in respect of a sale of such goods, that a personal examination of the bulk was not contemplated by either party, and that both intended to contract upon the sample only.

Such usage is not admissible to prove the contract of itself, or as of itself forming a part of the contract.

And it is not made out by proof of a custom to exhibit a specimen; but it must go to the extent of a mutual understanding that the bulk should be like the specimen in all respects.

Proof that a like usage prevails in respect of all goods sold in bales, boxes, and original packages, is not admissible to repel or destroy the force of a usage proved in respect of the particular article in question at the trial.

Evidence of allowances made in conformity to the usage set up, on sales made by exhibiting samples, is proper to establish such usage.

July 11, 13; Sept. 30, 1848; and again, July 2; Sept. 22, 1849.

CASE made up by consent, and submitted for the opinion of the court, upon the testimony taken on a trial of the cause, when a verdict was rendered which was afterwards set aside.

The action was assumpsit, for damages on an alleged warranty in the sale of twenty-seven bales of French blankets, by the defendant to the plaintiffs, on the 28th day of September, 1844. By the invoice or bill of parcels delivered to the plaintiffs, it appeared the sale was for a note at six months; the 27

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bales contained 1350 pairs of blankets, and the price was \$3 10, making \$4185.

The plaintiffs proved by a witness, who had for fourteen years been in the trade, and who was present at the purchase, that on asking for the blankets at the defendant's store, they were shown samples; and that the usual way was to buy by samples, and universally so at private sale. (The defendant's counsel objected throughout, to any evidence of usage or custom in the sale of blankets in opposition to the rule of *caveat emptor*.) The witness had always bought by samples, except sometimes at auction, where the bales were laid open. On this occasion, two or three blankets were exhibited to them on a counter. They examined the sample, and found them sound.

They were to be delivered to the plaintiffs on board a ship bound for New Orleans. Nothing was said by either of the parties as to warranting the goods, or as to samples. Defendant did not say where the bales were, nor did the plaintiffs ask where they were. Before January, 1845, the witness gave to the defendant a note from the plaintiffs, informing him the blankets were moth eaten, and claiming an allowance. The defendant's response was, that the blankets were perfectly sound when he sold them.

Mr. Gaillard testified, that his house had been engaged in the sale of French blankets ten years or more. It is the custom of the trade to sell by sample. One bale, or a single pair, is exhibited and taken as a sample of the whole. The only reason for selling by sample, is to avoid the inconvenience of opening and re-packing the bales; which also exposes them to damage. The liability to damage applies equally to all other woollen goods.

Mr. Ashton, engaged in the blanket trade, testified, that his house always sold by sample.

Mr. Gans testified to a like usage in the sale of English blankets.

The plaintiffs then gave evidence, that on the arrival of the blankets in New Orleans, two bales were opened which appeared to have been badly moth eaten. In January following, they were all examined by three merchants, skilled in the trade.



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Seventeen bales were found to be moth-eaten, and the damage was by them appraised at forty per cent. on the invoice price.

A clerk of the defendants testified, that he was present at the sale, which was made by exhibiting samples of a number of the bales. All the bales sold, except five, were in the store at the time of the sale. The plaintiffs were informed that the bales sold to them were in the store, and they might have examined them, as well as the other five, if they had desired to do so.

The defendant recalled Mr. Gans, who testified he would call all sales, when there was a sample bale exhibited, a sale by sample, though all might have been examined by the purchaser. If a purchaser wanted to see the bales, and said he would probably take them, if they corresponded with the samples, the witness would let him open them. He dealt in cloths, worsted and cotton goods, as well as blankets. These goods come, some in bales, and some in boxes or cases. He usually exhibits one bale or case, and the buyer takes the bulk from his confidence that the same will correspond with the samples. Such was the usual custom with all goods which are inconvenient to open or re-pack. Woollens are generally sold bale by bale, and if a man wanted to buy five bales, he would open only one. On a sale of blankets by sample, if a bale turned out to be unsound, he should feel bound to replace it.

The defendant then introduced witnesses to show a similar practice or usage in the city of New York, in the sale of cotton domestic goods and prints, and various articles of produce.

Mr. Gaillard, recalled by the plaintiff, testified that French blankets are put up, first in a wrapper of crown paper, over which is a linen wrapper, and then a covering of coarse hemp bagging.

A formal verdict for the plaintiffs, subject to the opinion of the court, was entered by the parties, and the case was argued at bar, by

*R. J. Dillon and D. Lord*, for the plaintiffs ; and

*F. B. Cutting*, for the defendant.

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BY THE COURT. OAKLEY, CH. J.—This is an action brought to recover damages on a sale of twenty-seven bales of French blankets. The blankets were shipped to New Orleans by the purchaser, and on being opened there, seventeen bales were found to have been injured by moths to such an extent that the damages were appraised at forty per cent. of the market value of sound blankets. Nothing was said at the time of the sale, as to its being a sale by sample, nor was there any express warranty. Samples of the blankets, were however exhibited to the purchaser at the time of the sale, and he did not examine the goods in the bales. It is contended on the one side, that this was a sale by sample, and that thus the blankets in the bales, were warranted to correspond with those shown; on the other side, it is denied that there was any sale by sample, and if there were, it was said the doctrine of warranty implied from such sales, is an innovation upon the common law which ought not to be sustained.

On looking into the law of the case, we find this subject of sale by sample has been very much discussed. In our own state, certain general rules are now well established. Thus, it is clear that the principle of *caveat emptor*, is the governing rule applicable to sales in general. If the buyer do not choose to rely upon his own judgment and his examination of the article, he must require a warranty from the seller.

Another rule has grown up, (which is an exception to the general rule,) that on a sale of goods by sample, there is an implied warranty that the bulk of the goods is equal to the sample in quality and soundness. This is a peculiar contract, in which the parties deal in reference to the sample merely, and not in reference to the bulk of the article. And this principle is as well established with us, as the general rule to which it is an exception.

Whether a sale be a sale by sample or not, is a question for the jury upon the evidence in each case; and to authorize a jury in finding the affirmative, it must appear that the parties contracted solely in reference to the sample or article exhibited; and that both the seller and buyer mutually understood they were dealing with the sample, and with an understanding that

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the bulk was like it. If these facts be made out, the legitimate consequence follows, that the seller warrants the bulk to correspond with the sample exhibited.

On the first trial of this cause, the question was submitted to the jury in the form we have stated it, and they found that this was a sale by sample. One of the justices of the court doubted whether there was a warranty proved, or whether it was only a representation, and a new trial was ordered. The case is presented to us in effect upon the same evidence. We have considered it, and if necessary, should not hesitate to say, that in our judgment, it is sufficient to establish a sale by sample as we have defined it, although the blankets exhibited were not called samples; that it was so understood by the seller, and received by the buyer. This, in the view we have taken of the case, will have to be submitted to a jury.

Another question was raised at the argument, upon the admissibility of evidence of the existence of a usage of trade in reference to this particular article of French blankets, as to which it is proper to express our opinion. The evidence was given to show that it was the usage of the trade, always to sell these blankets by sample; and that this practice has grown up by reason of their being exposed and made liable to injury, by opening the bales in which they are imported. We think such evidence is competent. We do not say that the testimony produced in the case before us, comes up to what it should in order to establish a usage of the kind alleged. But our opinion is, that evidence of a uniform usage, in a particular course of trade in this article, is admissible to show what both the purchaser and seller intended at the sale, and that a personal examination of the bulk of the article was not contemplated by either. The opportunity for such an examination of the bulk, is a strong fact in reference to the question whether a sale was or was not made by sample. If the article were in a situation to be examined, it is a circumstance to prove that there was no warranty intended. A usage like that alleged, established by showing the universal understanding reduced to practice, of those engaged in the trade, that such an examination was not to be made on a sale of French blankets in bales, would ob-

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viate the force of the evidence that the bulk of the article might have been examined by opening the bales.

It was insisted that the plaintiff was precluded by the bill of parcels delivered to him, (which is in the ordinary form of a bill of goods sold with a receipt at the foot for the price,) from asserting that there was any warranty; the bill containing nothing on that subject. We do not consider that the bill is to have that effect. Such bills do not include any thing as to the terms or manner of the sale, other than the price fixed. A warranty might be added, but the omission in the bill is not evidence that there was no warranty.

The difficulty, in our minds, is in respect of the damages. There was a long delay at New Orleans, after the injury to the goods was discovered, before the appraisement was made. The condition of the blankets at the time of the sale, was the criterion, and there was no direct evidence on the point. It was sought to infer it from the mode of transportation, and their subsequent state. But we know the injury by moths is progressive, and should not the party have investigated its extent as soon as he found it was going on? The evidence before us does not enable us to assess the damages to our satisfaction. We shall, therefore, send the cause back for trial, and the jury on this point must inquire, 1. Whether the blankets were in a damaged condition at the time of the sale? If they were, 2. What was the extent of the injury when the fact of its existence became known to the purchasers? If the injury were increased between that time and the appraisement, we at present think, (without intending to decide the point,) that the jury ought to give only the damages which had been sustained, when the injury was discovered.

New trial ordered.

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The cause was again tried in December, 1848, before SANDFORD, J.—Much the same evidence was given as to the particular sale in question, and the general usage of trade in the sale of French blankets. The latter was objected to by the defendant's counsel, as well as the evidence that allowances were made by the seller after sales by such usage, when the blankets

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proved to be defective. The plaintiffs proved more fully the condition of the blankets when opened at New Orleans, and the extent of the damage sustained. The proof of usage was more full than in the former case.

The defendant proved that these blankets were a part of sixty bales received by him from France, in the spring of 1844, and in respect of five or six lots of bales sold from the consignment, no claim for damages was made by any of the purchasers.

The defendant offered to prove that in the city of New York, prints, cotton goods, brown and white linen, brown drills, stockings in boxes, kerseys, broad cloths, and other woollen goods, and all articles in bales, boxes, or which are inconvenient to examine, or are sold at wholesale; are by general usage, sold by exhibiting samples or specimens, in the same manner that the French blankets in question were sold. The questions to this effect, were put in a great variety of forms, as to what was the general usage and custom on such sales; whether the same general usage spoken of as to French blankets, did not apply to all other goods sold in bales or in bulk, or in what respect it differed. To all this evidence the plaintiffs objected, the judge sustained the objection, and the defendant excepted. The defendant at the proper time moved for a nonsuit, which was overruled.

The Judge charged the jury as follows:

The plaintiffs claim damages on an alleged warranty in the sale of seventeen bales of blankets, which they insist were sold to them by sample. The general rule is, that the buyer of goods has no redress for defects in their quality, unless he has obtained the express warranty of the seller. An exception has arisen from the necessities of commerce, in the sale of goods in large quantities, and it is now established, that on a sale by sample, there is a warranty that the bulk of the goods sold, corresponds with the sample exhibited. This differs from a mere representation as to quality, for which there is no liability unless it were wilfully false as well as material.

There is no pretence in this case that there was an express warranty. Then, was it a sale by sample? This is a question

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of fact for you to determine on the evidence. It does not follow, from the exhibition of a specimen of the blankets, that the sale was by sample ; and you must be satisfied that it was understood by both parties as an agreement or undertaking, that the bulk of the bales corresponded with the blankets exhibited.

You will consider the manner and circumstances of the sale. The opportunity that existed for the examination of the bulk of the article, is a very important element ; and you may consider the relative convenience or practicability of making such an examination. In connection with this, is the testimony offered to prove it to be the usage of the trade to sell French blankets by the production and examination of samples. This testimony does not establish any general or uniform usage, such as would prove a contract, or warrant you, from the usage merely, to find that the parties contracted with the understanding, that this was a sale by sample. The evidence, as you will have observed when the subject of its reception was discussed, was not admitted for the purpose of proving a general usage of trade forming a part of the contract, or of itself establishing a sale by sample ; but it was received as an item of testimony tending to show, in connection with other evidence, that a personal examination of the bulk of the goods sold, was never contemplated by either party, and that both parties intended to contract upon the sample only ; and to make the testimony effective, even to this extent, you must be satisfied that there was a general usage in this trade, not merely to sell by exhibiting a specimen, but to sell thus with a mutual understanding, that the bulk should be like the specimen in all respects.

If upon the whole case, you are not satisfied that these blankets were sold with an understanding and implied agreement by both of the parties, that those in the bales corresponded in quality and condition with the sample exhibited, then no warranty is proved, and the plaintiffs cannot recover.

If you shall find that both parties understood that this was a sale by sample, then the law makes the defendant responsible, if the bales were not equal to the samples. The defendant, however, is not liable for any damage to the blankets occurring after the delivery of them. You must be satisfied that they

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were moth-eaten at the time of the sale and delivery. The rule of damages is the difference between the actual value of the goods in New Orleans in their damaged state, and what they would have been worth if they had corresponded with the samples.

To this charge, the counsel for the defendants excepted. The jury found a verdict for the plaintiffs, for \$1131 38, damages; and the defendant now moves for a new trial.

*F. B. Cutting*, for the defendant.

*R. J. Dillon*, for the plaintiffs.

BY THE COURT. OAKLEY, CH. J.—The law respecting sales by sample, was laid down by the judge at the trial, in exact conformity to our decision in September last, and nothing farther need be said on that subject.

A great number of exceptions was taken by the defendant's counsel to the ruling of the judge, in excluding certain testimony offered by him, and in the admission of other testimony offered by the plaintiff.

The offers on the part of the defendant were made in all manner of shapes, but with one single bearing, which was this: The court had decided that it was proper to inquire into the usage of trade, as to examining and inspecting the bulk of the particular article in question, viz., French blankets in bales; in order to show that both parties understood an actual inspection was not to be made; that both buyer and seller perfectly understood this, by the established custom and usage of trade in the article. In accordance with the principle thus established, evidence of such a usage in respect of French blankets was received at the trial. The defendant's offers were to show that all other bale goods, such as woollens generally, cloths, prints, &c., were sold in the same manner.

This was excluded at the trial, and we have no reason to doubt the correctness of the decision. Whether those articles were so sold or not, it could not affect the usage as to French blankets. If the former were sold in the same way, it would

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not prove the usage as to the latter. Distinct proof of a usage in that line of trade would still be necessary, if any reliance were to be placed on the custom of the trade. If the other articles enumerated were not sold in the mode which the plaintiffs claimed to have proved in respect of French blankets, it would not show that the latter were sold differently from what the plaintiffs alleged.

The defendant objected to the admission of evidence that allowances had been made by sellers for defects, on sales made by exhibiting samples, in conformity to the usage which the plaintiffs were seeking to establish. We think the objection was clearly wrong. The making of such allowances is the most vital part of the usage alleged, and proof of instances of the same, was a component part of the evidence of the usage, than which none could have been more satisfactory.

The motion for a new trial must be denied.

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**EMBURY and others v. J. and W. C. CONNER.**

The legislature has no authority to grant private property for private uses, making compensation to the owner, unless by his consent.

This is prohibited, as well by the spirit of the provision in the constitution that private property shall not be taken for public use, without just compensation, as by the constitutional provision, that no person shall be deprived of life, liberty, or property, without due process of law.

The provision in the act relative to the city of New York, allowing the corporation on opening or widening a street, which improvement takes a part of an entire lot of ground; in the discretion of the commissioners to include in their estimate and assessment the whole of such lot, awarding damages to the owner, and thereupon the title of the owner to be divested in the portion of the lot not required for the street, and the same to become vested in the corporation; is unconstitutional and void, as to such residue not required for the street.

In an ejectment for a piece of land thus unconstitutionally taken on a street widening, it appeared that the owners, after the corporation had conveyed the land away, received the compensation awarded by the commissioners in an entire sum, as well for such piece as for the land taken for the street; that the owners had contended before the commissioners for a greater allowance and not that their proceeding was illegal; and that the grantee of the corporation had taken



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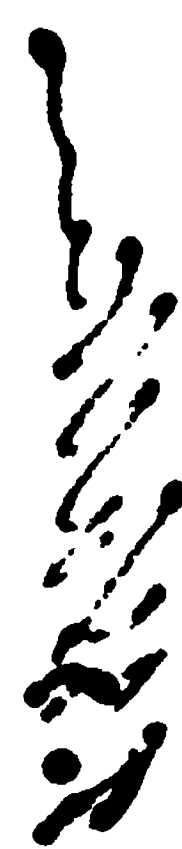
possession, and held it undisturbed for seventeen years; *held*, that the owners were not estopped or barred from recovering the premises in ejectment.

The provision of the act, that unrecorded deeds shall be void against *bona fide* purchasers, &c., is intended for the protection of purchasers against previous grants of those under whom they derive title. It has no application to a purchaser who derives his title from one claiming in hostility to all of the parties in the unrecorded deed.

July 10, 11; Sept. 30, 1848.

**EJECTMENT**, for a piece of ground at the North-West corner of Nassau and Ann streets, in the city of New York, being seventy feet and seven inches long on Ann street, nine feet and nine inches wide on Nassau street, seventy feet on its northerly side, and nineteen feet and one inch wide in the rear. The plaintiffs, Peter Embury, Hannah Aymar, and Margaret Jacot, derived their title from Daniel Aymar, who died seised of the premises in question in 1815, leaving five children and heirs, viz.: the above named Hannah and Margaret, Francis and John D. Aymar, and Catharine, the wife of Peter Embury. The premises were a part of a lot owned by Daniel Aymar, which was twenty-five feet in front, thirty-four feet in the rear, and about seventy feet in depth. All of his heirs united in the conveyance of this lot to Philip Embury, May 2d, 1821; who, on the 30th of October, 1821, by separate deeds, conveyed two undivided fifths of the same to the plaintiff, Peter Embury, two other undivided fifths to the plaintiff, Hannah Aymar, and the residue to the plaintiff, Margaret Jacot. The deed to the latter was not recorded at the time of the trial. The plaintiffs then proved, that the defendants were in possession of the premises in question on the 19th March, 1847, when the suit was commenced; and thereupon rested.

The defendants introduced the proceedings of the common council of the city, for the widening and improving Ann street, by which it appeared that a resolution for widening Ann street, between Broadway and Nassau street, was duly adopted, December 22d, 1828. That thereupon, application was made to the supreme court, and commissioners of estimate and assessment were appointed pursuant to the act of April 9th, 1813. That on the 22d of August, 1829, the supreme court confirmed the report of the commissioners, together with an additional



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report, the one dated July 8th, and the other July 31st, 1829. By the commissioner's report, it appeared that they had taken for the widening of Ann street, the southerly portion of the lot so owned by the heirs of Daniel Aymar, as being required for the street itself, such portion being fifteen feet and two inches on Nassau street, and sixteen feet and five inches wide in the rear, and extending the whole length of the lot. The commissioners further reported, that this ground belonged in fee to the devisees of Daniel Aymar; that the same was a part only of a lot of land, of, in, and to the whole of which the devisees of Aymar were seised in fee; that they, the commissioners, deemed it expedient and proper to include and comprise in that, their estimate and assessment, the whole of the residue of such lot, so belonging to Aymar's devisees, along with that part of the same which was in the report before described, as being required for the purpose of the street, in like manner as if such residue were also required for that purpose. The report then proceeded to describe such residue, it being the same premises for which this suit was brought. It then stated, that the commissioners had estimated and assessed the loss and damage to the devisees from the widening and improving of Ann street, by and in consequence of their relinquishing their interest in the piece of land required for that purpose, and also with the residue so included and comprised therewith, and in the buildings situated on the entire Aymar lot, at the sum of \$11,220.

By the additional report of the commissioners, it appeared that on re-considering their estimate and assessment, they awarded to Aymar's devisees \$11,370, instead of the sum before mentioned. By the papers attached to the proceedings on file in the supreme court, it appeared that Peter Embury, on the 13th July, 1829, objected in writing, and at great length, to the amount of damages estimated by the commissioners, as being unjust; stating that they were taking his property against his consent, and that he should oppose the confirmation of their report. An affidavit of one of the commissioners was attached, sworn August 1st, 1829, stating that Embury appeared before them in behalf of Aymar's devisees, and urged them to take the whole lot, and not leave the gore remaining; and insisted

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upon it, against the persuasions of the commissioners, who finally deemed it expedient to include the whole lot in the assessment.

The defendants offered a certified copy of Embury's objections, attached to the additional report of the commissioners, in which he objected to the amount of the award, and insisted on its being increased, but made no objection to the commissioners including the whole lot in their estimate, instead of the part actually required for the widening of the street. This evidence, with some other not deemed necessary to be stated, was excluded by the judge. The rule confirming the report, showed that its confirmation was opposed before the supreme court.

The defendants then proved the signature of the plaintiffs, P. Embury and H. Aymar, and the then husband of Mrs. Jacot, to a receipt, dated September 1st, 1830, by which they acknowledged to have received from the street commissioner of the city, a warrant for \$11,370, expressed to be the amount awarded to the devisees of Daniel Aymar in widening Ann street. The warrant was also produced, drawn upon the treasurer of the city, payable to the "devisees of Daniel Aymar," expressed to be for the award on widening Ann street, and which appeared to have been indorsed by the three persons who signed the receipt. The fact of its payment was admitted.

The defendants then read in evidence a deed from the corporation of the city of New York to James Conner, one of the defendants, dated March 27th, 1830, for the consideration of \$4700, quit claiming to him the premises in question, described by metes and bounds, and as being the residue of a lot owned by Daniel Aymar's devisees, part of which was required for widening Ann street, and such residue was included and comprised by the commissioners of estimate and assessment, with the part so required for the street, and which on confirmation of their report, became and was vested in the corporation pursuant to the statute.

The plaintiffs then read in evidence a deed from Philip Embury to Margaret Jacot, dated May 25th, 1846, confirming and conveying to her the premises conveyed to her by his former deed.

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Various objections to the evidence, were taken on both sides, which were reserved at the trial ; and, with the consent of the parties, a verdict was taken for the plaintiffs, subject to the opinion of the court.

*E. Sandford*, for the plaintiffs.

The evidence on the part of the plaintiffs established their title to the premises in question, in the respective proportions described in their declaration.

The several papers, records and other evidence given on the part of the defendants, did not show any title to the premises in question :

1. Because the act (2 R. L. 416, § 179 ; repealed, Laws of 1839, p. 185 ;) authorizing the commissioners, in all cases where part only of any lot of ground should be required for widening or opening a street, leaving a residue belonging to the same owner or owners, *and the commissioners should deem it expedient* and proper so to do, to include in their estimate the whole of such lot in like manner as if such residue was required for the improvement, and vesting upon the confirmation of their report, all such residue in the mayor, &c., of New York, in fee simple ; was unconstitutional and void.

The constitution of 1777, did not delegate any authority to the legislature to take the property of one person and give it to another, with or without compensation.

The vesting of the "supreme legislative power" in the senate and assembly, conferred no right to take private property for private purposes. (Const. of 1777, Art. II ; *Taylor v. Porter*, 4 Hill, 140, 144, 5 ; *Wilkinson v. Leland*, 2 Peters, 657.)

It provided that no member of the state should be disfranchised or deprived of any rights, &c., unless by the law of the land or the judgment of his peers. The terms "law of the land," mean by due course and process of law. (2 Coke's Inst. 45, 50 ; 3 Story on Const. 661, § 1783 ; 2 Kent's Com. 13 ; 4 Hill, 145, 146.)

2. If this part of the act of 1813 was within the constitutional powers of the legislature at the time of its enactment, the constitution of 1821 abrogated it by declaring that private pro-

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perty should not be taken for *public use* without just compensation. (Const. of 1821, Art. 7, § 7; *Matter of Albany Street*, 11 Wend. 149; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 59; *Matter of John & Cherry Streets*, 19 *ibid*, 659, 665 to 667, 675; *Varrick v. Smith*, 5 Paige, 137; *Taylor v. Porter*, 4 Hill, 140, 147–8.)

3. In assuming to take the property in question, the commissioners assumed to exercise the powers conferred upon them by this unconstitutional act, and the case does not present the question whether the report made by the commissioners, that they had taken the portion of the lot in question, which was not required for the widening of Ann street, with the express assent of the plaintiffs, and the confirmation of that report, could have operated to divest the plaintiffs of their title to the land.

4. If the question last referred to were presented, any parol assent which might have been given by the plaintiffs, could not have operated upon their title to the land. (1 R. S. 738, § 137, 138; 1 *ibid*, 756, § 1; and 762, § 38; 2 R. S. 134, § 6; *Howard v. Easton*, 7 J. R. 205; *Cook v. Stearns*, 11 Mass. R. 533, 36; *Noyes v. Chapin*, 6 Wend. 461; *Hess v. Fox*, 10 Wend. 437; *Trustees of Presbyterian Society v. The Auburn & Rochester R. R. Co.*, 3 Hill, 567.)

The acceptance by the plaintiffs of the moneys awarded by the commissioners, did not divest their title to the land in question, nor constitute an estoppel *in pais*, by which the plaintiffs can be prevented from asserting their title. A part of the moneys so awarded was justly due to the plaintiffs. They were awarded to them as an entire sum. No right to apportion existed, nor were there any means, either in their possession, or in the possession of the corporation, by which they could have ascertained the amount justly due to them, for that portion of the lands to which their title became divested by the confirmation of the commissioners report. They had to take the whole or none. The corporation of New York did not act upon their acceptance of this award in disposing of the land in question, for they had sold and conveyed it to Conner, previously to the payment of the money by them. (*Dezell v. Odell*, 3 Hill, 319; *Lyon v. Reed*, 13 Mees. & Wels. 285, 309; *Nicholls v. Ather-*

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stone, 11 Lond. Jur. R. 778; Smith's Lead. Cas. Amer. Notes, 467, 8; 2 Metc. 423, 431.)

*J. S. Van Rensselaer*, and *W. Kent*, for the defendants.

1. The power given to commissioners of estimate and assessment, on the widening and improvement of streets in the city of New York, under the act of 1813, to include in their estimate of damage and benefit, the residue of a lot, part of which only is required for public use; is advantageous to the owner, and is constitutional and lawful; especially when exercised with the consent of the owner. (*Case of Trinity Church*, 11 Wen. 149.)

2. The consent and ratification of the owner may be inferred from circumstances; and the taking, the consideration money and award, and delivery of possession of the land by the owner, his acquiescence for seventeen years in such possession and in the improvement of it by erecting buildings, &c. by purchasers, without any claim of title by the former owners; or any one of these acts, is conclusive evidence of such consent. (Broom's Legal Maxims, 309; 26 Wend. 53.)

3. The commissioners report, and the schedules and papers annexed, confirmed by a rule of the supreme court, form the record of the proceedings, which cannot be separated, and must go together; and *thus form the conveyance of the land* awarded to the common council in this case. (11 Wend. 149; 1 Phill. Evid. 385; Cow. & Hill's Notes on same, 1059.)

4. The laws for improving streets in New York, are recognized by the revised statutes, and provide a mode of transferring real estate taken in cases of improving streets, peculiar to themselves, and different from the mode prescribed by the revised statutes for granting land in every other case, but equally legal and efficacious.

5. The order of the supreme court, confirming the report and proceedings of the commissioners, after due notice to all the parties concerned, published according to law; was a final decision, subject to review in the court of errors, and the owners in this case having omitted their writ of error within five years, are concluded, and cannot now review the proceedings by eject-

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ment, after acquiescing seventeen years. (12 John. Rep. 31 ; 16 Wend. 371 ; 11 Wend. 154 ; 2 Howard, 319 ; 5 Pike, 424.)

6. The deed of Philip Embury to Margaret Jacot, of 11th May, 1821, was not recorded, and therefore, by the law of March 30th, 1811, (2 R. S. p. 406,) was void as respected *bona fide* purchasers. James Conner was such *bona fide* purchaser, as was also his grantee. No recovery can therefore be had as to the one-fifth of the premises in question, which the plaintiffs claim that Philip Embury conveyed to Margaret Jacot.

7. The plaintiffs and each and every of them, by receiving from the corporation the amount awarded by the commissioners, and by yielding up possession of the premises in question, and by their acquiescence in the possession of the corporation and their grantees, and by each of those acts, are estopped from impugning or denying the validity of the proceedings under which the premises in question were taken. (Smith's Leading Cases, 467 ; 6 Adolp. & E. 474 ; 3 Hill, 219 ; 6 *ibid*, 47.)

8. The proceedings to widen Ann street, having been commenced and carried on under authority of a statute, and the land in question taken under such statute, and no objection having been made to the validity of the statute, or the legality of the proceedings, or the jurisdiction of the court, the proceedings, and all contracts acquired under them, will not now be disturbed. (4 Pike, Arkansas R. 582 ; 24 Wend. 338 ; 5 Pike, 424.)

BY THE COURT. VANDERPOEL, J.—Some objections were taken to certain testimony offered by the defendants, and sustained by the judge at the trial ; but as the ground on which we have concluded to dispose of the case, is broad enough to strike at the whole defence, and the evidence rejected, if admitted, could not, in our view, have varied the result to which we have come ; I shall forbear to discuss the question, whether the judge was right in rejecting the testimony offered and overruled.

We see no difficulty in the claim of the plaintiffs, unless the same is barred by the proceedings to open Ann street. The several deeds and other matters given in evidence on the part



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of the plaintiffs, established their title to the premises in question, in the proportions described in their declaration.

The principal question is, whether the proceedings of the corporation to widen Ann street, and the appropriation of the premises by them, divested the plaintiffs of their title, and vested the same in the corporation, under whom the defendants claim.

The commissioners proceeded under the 179th section of the act to reduce the laws of the city of New York into one act, (2 R. L. 416,) which provides in substance, that where only part of any lot or parcel of land shall be required for any improvement, leaving a residue, and the commissioners shall deem it expedient to include or comprise in their estimate and assessment the whole or a part of such residue, and shall so include it, then, on the confirmation of the report, the whole or part of such residue, so included in the assessment, shall be vested in the mayor, aldermen, and commonalty of the city. The premises in question were included in the assessment; the report of the commissioners was duly confirmed, by reason of which the defendants, who hold under the corporation, claim that the title became vested in the corporation.

Upon this point, we find an express adjudication in *The Matter of Albany Street*, (11 Wend. 149.) Chief Justice Savage, in commenting on the section under which the corporation has proceeded, says, that "The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another. It is in violation," he says, "of natural right; and if it is not in violation of the *letter* of the constitution, it is of its *spirit*, and cannot be supported."

The constitution of 1777, did not delegate any authority to the legislature to take the property of one person and give it to another, with or without compensation. It ordained and declared, that the supreme legislative power within the state should be vested in the senate and assembly; (Art. 1 of Const. of 1777;) but this surely conferred no right to attack private property for private purposes. It also (Art. 13,) declared, that no member of the state should be disfranchised or deprived of



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any of the rights or privileges secured to the subjects of the state, unless by the law of the land, or the judgment of his peers. The words "by the law of the land," have been held to mean "*by due course and process of law.*" (*Taylor v. Porter*, 4 Hill, 140.) They do not mean, a statute passed for the purpose of working the wrong. (*Ibid.* 145.) Justice Bronson, in the above case, holds that the section was taken, with some modifications, from a part of the 29th chapter of Magna Carta, which provides, that no freeman shall be taken or imprisoned, or be disseised of his freehold, but by the lawful judgment of his peers, or by the law of the land. (2 Story on Const. 661, § 1783.)

But if this part of the act of 1813, were within the constitutional powers of the legislature, at the time of its enactment, the constitution of 1821 abrogated it, by declaring that private property should not be taken for public use, without just compensation. (Const. of 1826, Art. 7, sec. 7. *Matter of Albany Street*, 11 Wend. 149. *Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 Wend. 59. 19 Wend. 659, 675. *Taylor v. Porter*, 4 Hill, 140.)

In *Bloodgood v. The Mohawk and Hudson R. R. Co.*, (18 Wend. 59,) Mr. Senator Tracy says, these words of the constitution should be construed "as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation." Justice Bronson, without questioning the soundness of this view, seems to think that the case stood stronger upon the first member of the clause, "No person shall be deprived of life, liberty, or property, *without due process of law*;" holding that these words cannot mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. We are, therefore, on the most conclusive authority, bound to say, that the provision of the act of 1813, under which the corporation, or the commissioners in their behalf proceeded, in respect to the premises in question, is unconstitutional.

2. It is contended, that the plaintiffs, by receiving from the

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corporation the amount awarded by the commissioners, and by yielding up the premises to them, are estopped from denying the validity of the proceedings under which the premises were taken, and have, by those acts, given a binding consent and ratification to the proceedings.

This strikes us as the only question in the cause worthy of serious consideration ; the former having been previously ruled in direct terms.

In undertaking to take the property in question, the commissioners assumed to exercise the power conferred upon them by this unconstitutional act. The report of the commissioners does not proceed on the ground, that they had taken the portion of the lot in question, which was not required for the widening of Ann street, with the express assent of the plaintiffs. On the contrary, the corporation proceeded on the ground that the title of the plaintiffs was divested by the confirmation of the report, whether they consented or not. The statute in question does not provide for any parol assent ; and sitting in a court of law, we cannot see how any such assent which might have been given by the plaintiffs, could have operated to divest their title to the land. The statute of frauds, (2 R. S. 134, § 6,) provides, that no estate or interest in lands, other than leases for a term not exceeding one year, shall be created, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or his agent, authorized by writing. This creates an insuperable difficulty in the way of the defendants. There is no estoppel by deed here, nor is there any thing in the acts of the parties to constitute an estoppel *in pais*. The acceptance by the plaintiffs of the money awarded by the commissioners, could not divest the legal title of the plaintiffs to the land in question, nor constitute an estoppel *in pais*, to preclude them from asserting their title. The plaintiffs were clearly entitled to part of the money awarded to them. It was assessed or awarded to them as an entire sum ; nor was there any right to apportion it ; neither could they say to the corporation, " We will take part of this money, just enough to cover the land you actually appropriated to public use, and reject the residue."

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They had no means of ascertaining the amount due for that portion of the land, as to which their title became divested, by the confirmation of the commissioners report. They were obliged to take the whole or none. The corporation did not take or sell the premises on the ground, that the plaintiffs had accepted the sum awarded; for they sold and conveyed to the defendant, J. Conner, before the money was paid to the plaintiffs. We cannot say that the corporation would not have taken the land, had the plaintiffs refused to accept the amount awarded to them. On the contrary, they claimed the right to take and sell the land, the moment the report was confirmed, and before the award was paid.

The legislature had thrown these owners helpless, at the feet of the commissioners. According to the act, they had no option to part with their property or not. No act of theirs, induced the corporation to part with its money. If there could be such a thing as an estoppel *in pais*, in a court of law, every element of such estoppel is here wanting. Peter Embury was a resisting party, and did not lead the corporation into the taking of the property. As the statute under which the proceeding was had, had no operation at all, the alleged assent is good for nothing. We have yet to learn, that a parol assent will, at law, convey a title to land. (*Dezell v. Odell*, 3 Hill, 215; *Lyon v. Reed*, 13 Mees. & Welsby, 285, 309.) As to estoppels, we refer to the American notes to Smith's Leading Cases, in 28 Law Library, N. S. 467; and 2 Metcalf, 423, 431.

I have omitted to notice the objection to the plaintiffs title derived through the deed from Philip Embury to Margaret Jacot, executed in 1821; on the ground that it was not recorded, until after Conner received his conveyance from the corporation. As to this, it suffices to say, that the provision in the recording act, is intended for the protection of purchasers against previous grants made by their own grantor, of which they were ignorant. It has no application to a purchaser who derives his title from one claiming in hostility to all of the parties in the unrecorded deed.

There must be judgment for the plaintiffs.

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Heath v. Westervelt.

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**HEATH and ARMSTRONG v. WESTERVELT, Sheriff, &c.**

Voluntary assignees of a defendant in an execution, who become such after a levy, are not *strangers* within the meaning of the rule which requires an officer justifying against a stranger, to show a judgment as well as an execution.

It is sufficient in an action by such assignees against a sheriff, for the latter to produce his execution, and the former cannot impair his right to retain the goods levied, by attacking the judgment.

July 17 ; Sept. 30, 1848.

**REPLEVIN.**—Upon the trial, it was admitted that on the 17th of August, 1847, Thomas B. Wheeler was the owner and in possession of the property in question, at his store, number 88 Bowery ; and that on the 20th of the same month, he executed and delivered to the plaintiffs an assignment of the same, for the benefit of his creditors. On the 21st day of September, 1847, the plaintiffs demanded the property from the defendant, and he refused to deliver the same. The demand was in writing, addressed to him as sheriff, and mentioned the property as that levied on by him in the store, 88 Bowery, under pretence of an execution in favor of Luther Williams against Wheeler ; and called on the sheriff to deliver up the immediate possession of the same to the plaintiffs, whose title as assignees was stated.

A witness for the plaintiff then proved the value of the property. On his cross-examination, he testified that a deputy of the sheriff, had made a levy on the stock in question, and had left a man in charge of it before the assignment was executed. The witness was not present when the levy was made.

The defendant's counsel introduced a paper from the files of the county clerk's office, purporting to be the record of a judgment in the supreme court, recovered by confession without suit, in favor of Luther Williams against Wheeler, filed August 17th, 1847.

The plaintiffs objected to the evidence, on the ground that on the face of the paper, it appeared to have been altered in the date of the signature thereof, from August 21st to August 17th, and that such alteration should be first explained, and proof be

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made of the time when the paper was actually signed and became a record. The objection was overruled, and the record was read in evidence.

The signature of the judgment, had first been dated August 21st, and the figures "21st" had been stricken out, and "17th" inserted, and a note was appended, to the effect that the date "21st" was altered to "17th," by an order of the court dated September 16th, 1847. The record appeared to have been filed August 17th, 1847.

The defendant next read in evidence, under an objection of the plaintiffs, an execution on that judgment, directed to the sheriff of New York, which was indorsed as having been received by the defendant on the 18th day of August, 1847. It was admitted that on the same day, the execution was levied on the property in question.

The defendant then read in evidence, under objections to its competency, a certified copy of a rule made by the supreme court, September 16th, 1847, upon a motion made on behalf of Wheeler to set aside Williams' judgment and execution, by which rule the motion was denied, and the plaintiff was allowed to amend the judgment record, by having it signed by the clerk as of the 17th of August, 1847.

The plaintiffs then called the deputy clerk as a witness, and offered to prove, that he filed the judgment record, and that when it was filed, it had not been signed by any officer. That immediately after filing it, the witness discovered it had not been signed, that there was no warrant of attorney executed by the defendant, with the same, and witness at once notified the attorney of the defects, who promised to supply them next morning. The record was not signed till August 21st, and was then signed by another deputy in the clerk's name; and no warrant of attorney was ever produced to the officer who signed the record. This testimony was objected to by the defendant's counsel and excluded by the judge.

The plaintiffs were thereupon non-suited; and they now move to set the nonsuit aside. ●

*E. Sandford*, for the plaintiffs.

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*N. B. Blunt*, for the defendant.

BY THE COURT. SANDFORD, J.—On looking into this case, we find it unnecessary to decide the question, as to the validity of the judgment entered up by Williams against Wheeler, and the admissibility of the testimony offered with a view of impeaching the record. Independent of those questions, we think the ruling at the trial was correct.

On the 20th of August, 1847, the sheriff was in possession of the goods by his levy; and could have maintained his right to them, as against Wheeler, upon the execution alone, without resorting to proof of the judgment.

The assignment subsequently executed by Wheeler to the plaintiffs, transferred no greater or other right than he himself had. The plaintiffs are voluntary assignees; not purchasers in good faith for value, without notice. They received the property, just as Wheeler held it, and subject to the rights which the sheriff had acquired; one of which was to retain it by force of the execution and his levy.

The plaintiffs therefore are not *strangers*, within the meaning of the rule, which requires an officer justifying against a stranger, to show a judgment as well as an execution. The sheriff is acting strictly on the defensive, against parties who derive their title from the defendant in the process, subsequent to the levy; and who in this sense, are privies of the defendant.

The regularity of the judgment was therefore immaterial, and the points presented on that subject may be laid out of view.

As to the nonsuit, it was discretionary with the judge; and he adopted the course least prejudicial to the plaintiffs.

Motion to set aside the non-suit denied.

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The Bowery Savings Bank v. Clinton.

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**THE BOWERY SAVINGS BANK v. CLINTON.**

A discharge in bankruptcy does not extinguish the bankrupt's debts. It exonerates from them, his person and his future acquisitions, but it does not impair their obligation in respect of sureties.

On the bond of J. to the plaintiffs, bearing interest at 6 per cent, C. indorsed a covenant, binding himself to them for "an additional one per centum per annum interest, making in all seven per centum per annum on the principal sum secured" by the bond, until the principal should be paid, the interest to be paid at the time and in the manner mentioned in the bond. *Held*, that C. was not bound to pay seven per cent interest, nor more than one per cent on the amount of the bond. That he was liable to pay one per cent, until the bond was paid off. Sept. 11th; Sept. 30th, 1848.

CASE, subject to the opinion of the court.

The action was covenant on a writing under seal, indorsed upon a bond executed by James Conner to the plaintiffs. This bond of Conner was dated July 23d, 1835, and the condition was for the payment of \$1500, in one year, with interest at six per cent per annum, half-yearly. The defendant's covenant was dated July 1, 1837, and was in these words, viz. :

"For and in consideration of one dollar to me in hand paid by The Bowery Savings Bank, obligees in the annexed bond named, the receipt whereof is hereby acknowledged, I, Charles A. Clinton, do for myself, my heirs, executors and administrators, covenant and agree to and with the said The Bowery Savings Bank, their successors or assigns, an additional one per centum per annum interest, making in all seven per centum per annum on the principal sum, secured thereby from the date hereof, until said principal sum shall be fully paid, the interest to be paid at the time and in the manner mentioned in the condition of said bond."

The plaintiffs proved that the defendant, for some time prior to the making of this agreement, had paid the interest on Conner's bond, at the rate of six per cent per annum, and from that time had paid interest on the bond to the first day of August, 1846, at the rate of seven per cent per annum, on the principal sum mentioned in the bond. It

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was admitted by the plaintiffs, at the request of the defendant, and given in evidence subject to the plaintiffs objection thereto, that Conner, since the making of the bond and agreement, and prior to the accruing of the plaintiffs demand against the defendant, was discharged from his debts in bankruptcy, in the district court of the United States for the southern district of New York.

*A. Schell*, for the plaintiffs.

*W. B. Aitken*, for the defendant.

BY THE COURT. OAKLEY, CH. J.—One principal question presented by the case is whether the discharge of the principal debtor, Conner, from his debts, in the proceeding in bankruptcy, was a discharge of this collateral covenant executed by the defendant. It was contended that the bankrupt discharge was an extinguishment of Conner's debt; and that consequently by the fair construction of the covenant executed by the defendant, his obligation is discharged.

It is clear that the effect of the bankrupt discharge was only to relieve the obligor from his personal liability, and to exonerate his subsequently acquired property from liability for existing debts. For all other purposes, and for many that are important, his debts remain unextinguished. Such is the law, as it is well settled. We refer to *Storm v. Waddell*, 2 Sandf. Ch. R. 494, 525, and the cases there cited. There is no doubt that this is the effect of a discharge in bankruptcy, and it cannot affect a collateral covenant like the one in suit.

The plaintiffs claim that by the true construction of the defendant's covenant, he was bound to pay the whole seven per cent interest; as well the six per cent reserved in Conner's bond, as the one per cent mentioned in his covenant; the effect of which would be to make him liable for a perpetual annuity equal to the interest on the amount of the bond, unless he should discharge the principal debt, or it should be otherwise extinguished.

As to this, we think by the plain meaning of the defendant's



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covenant, it extended only to one per cent interest on the amount of the bond. The six per cent interest was secured by the bond of Conner, and the only object of the covenant was to provide for an additional one per cent. It did not make the defendant liable for the six per cent already secured. He will continue to be liable for the one per cent, until the debt be discharged.

Judgment for the plaintiffs for the amount of the one per cent interest on the bond.

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MONTROSS & UNDERHILL v. CLARK, impleaded, &c.

Where a negotiable note is lent by the maker to the payee, or given for the latter's accommodation, without restriction as to the mode of using it, it is valid in the hands of any person to whom it has been transferred for value before maturity, although such value consists in its application to the discharge of a precedent debt due from the payee to such holder.

An accommodation bill or note, when negotiated to a third party, imports a consideration as between him and the prior parties.

Sept. 18th ; Sept. 30th, 1848.

ASSUMPSIT against the defendant as the maker of a promissory note for \$183 47, dated Albany, January 20, 1847, payable three months after date, to the order of Lyman Clark, at the Commercial Bank, and indorsed by the payee. At the trial before SANDFORD, J. in June, 1848, the plaintiffs proved the defendant's admission that he made the note, but ought not to pay it, because he lent it to Lyman Clark, to help him out of difficulty.

The defendant called, as a witness, the payee of the note, who testified that when the note was given, he was a merchant at Albany, in good credit. He borrowed the note of his brother, the defendant, to raise money on it at the bank. Told him witness wanted to borrow his note, and he lent it. Told him witness wanted to get it discounted at the Albany City Bank. He made the note, and lent it to witness for that purpose. There

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was no consideration paid for it. He never received anything for it. The witness transferred the note to the plaintiffs in part payment of a note they held against him. (It appeared that the witness sent the note in suit to the plaintiffs the day after its date.) After this note fell due, witness gave plaintiffs his check for it, dated five or six days ahead, and they said they would give the note up to him. He, at the same time, told them it was his note to pay, and not his brother's. Witness kept his account in the Albany City Bank. (There were some discrepancies in the statements of the witness as to the time of the transfer of the note to the plaintiffs.)

The counsel for the defendant requested the court to charge, 1st. That the note having been made by the defendant, and lent by him to Lyman Clark for his accommodation, and without any consideration received by the defendant; and the plaintiffs having received the note in part payment of a precedent debt, and not having paid any thing for it, they took it subject to all the equities existing between the original parties, and the want of consideration was a good defence.

Also, that the note was misappropriated from the purpose for which it was given, and on that ground the defendant is not holden.

The court charged the last point as requested, (for the purposes of the trial,) and left it to the jury to decide, first, for what was the note in suit given by the defendant?

If it were by him lent to Lyman Clark, or given for Lyman's accommodation, without any restriction as to the mode of using it, the court instructed the jury that the plaintiffs, taking it in payment of their note against Lyman, became entitled to recover it against the defendant. But if the note in suit were given by defendant for the sole purpose of having it discounted at the Albany City Bank, then if it had been negotiated to the plaintiffs without the assent of the defendant, he is not liable to them. The court submitted these inquiries to the jury on the testimony of Lyman Clark and the circumstances proved.

The plaintiffs excepted to the charge on the point as to the misappropriation of the note, and the defendant, on the point that the want of consideration is no defence.

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The jury found a verdict for the plaintiffs, and the defendant moved for a new trial.

*J. E. Cary*, for the defendant.

*G. M. Speir*, for the plaintiffs.

BY THE COURT. VANDERPOEL, J.—The note in suit was an accommodation note, given by the defendant, Lewis Clark, to “help his brother Lyman out of difficulty,” to borrow the language of the witness, Pierson. The defendant resists its payment on three grounds, viz., 1st. That the plaintiffs paid nothing for the note, and that therefore it is subject to all the equities between the original parties. 2d. That it was diverted from the purpose for which it was given, and that, therefore, the defendant, as accommodation maker, is not bound. 3d. That the taking the check of Lyman Clark, under the circumstances disclosed in the case, payable five days after its date, was such an extension of the credit, as to discharge the defendant.

The first question is, whether the defendant paid such value for the note as to be entitled to protection. The plaintiffs, according to the testimony of Lyman Clark, took the note before it became due, in part payment of a note which the plaintiffs held against Lyman, for \$409, and gave up to Lyman his note, he paying the plaintiffs the difference between the two notes, in money. Ever since the case of *Bay v. Coddington*, 20 John. 637, this has been held a sufficient parting with value, to enable a *bona fide* holder of an accommodation note to recover. (*Bank of Sandusky v. Scoville*, 24 Wend. 115; *Grandin v. Le Roy*, 2 Paige, 509; *Stalker v. M<sup>r</sup> Donald*, 6 Hill, 93; *Small v. Smith*, 1 Denio, 503.)

In the case last mentioned, Beardsley, J. said, that as a general proposition, it was true, that if the plaintiffs received the note in payment and satisfaction of a debt due to them from the accommodation holder, *that* was a sufficient consideration for its transfer, and they thereby became purchasers for value. To protect, however, the holder of a negotiable security which has been passed to him in fraud of the rights of others, he must

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not only have taken it without notice, but must also have parted with something of *actual value* upon the credit or faith thereof. Here, the plaintiffs parted with the note they held against Lyman Clark, and gave it up to him. By this, the relations of the parties were changed. The rule has long been uniform and well established, that the holder of negotiable paper must part with something of *value* to enable him to recover against an accommodation maker or indorser, where the transfer of the note is fraudulent as against him; but what constitutes such value, is a question which still seems doomed to judicial conflict. The rules of the supreme court of the United States, and the late court of last resort in this state, are discordant on this subject. (*Swift v. Tyson*, 16 Peters, 1; *Stalker v. M'Donald*, 6 Hill, 93.)

But this inquiry becomes quite immaterial, if there was, in point of fact, no diversion of the note from the purpose for which it was created. If it were an accommodation note, without restriction as to the manner in which it should be used, then it was not passed to the plaintiffs in fraud of the maker, and it is not for him to inquire, whether the plaintiffs took it for a pre-existing debt, or for value actually advanced contemporaneously with its transfer. The judge, at the trial, charged upon the question as to the effect of the alleged diversion, full as favorably to the defendant as the law warrants; and the jury, to have found their verdict, must have concluded, that the note was not given for the sole purpose of having it discounted at the Albany City Bank; and we feel no disposition to arraign their finding, in this particular. The note was lent to Lyman, to help him out of difficulty; and the jury may have properly supposed, that it would answer that end as effectually by applying it to a debt which Lyman owed the plaintiffs, as by any other use of it. Lyman says, he told the defendant, that he wanted to get the note discounted at the Albany City Bank; but there was no positive agreement, that it *should* be discounted there. To expose negotiable paper to the objection of a diversion from the use to which it was to be applied, an agreement as to the manner in which it was to be used, must be shown. A mere intimation of the party accommodated, that he "wants

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or expects to get it discounted at a particular bank," is slight evidence indeed of such an agreement, especially when the note was given for the general purpose of helping him out of difficulty. Judge Story, (1 Story on Bills, § 191,) says, it is no defence or bar, that the bill was known to the holder to be an accommodation bill between the other parties, if he takes it for value *bona fide*, before it has become due. The reason is, he remarks, that the very object of every accommodation bill is to enable the parties thereto, by a sale or other negotiation thereof, to obtain a free credit and circulation thereof; and this object, he says, would be wholly frustrated, unless the purchaser or other holder for value could hold such a bill by as firm and valid a title, as if it were founded in a real business transaction. In short, the parties to every accommodation bill hold themselves out to the public by their signatures to be absolutely bound to every person who shall take the same for value, to the same extent, as if that value were personally advanced to them, or on their account, or at their request.

3. The judge properly submitted the point in relation to the taking of Lyman Clark's check. The jury must, under the charge, have found that there was no agreement on the part of the plaintiffs to wait until the check became due, and that they did not receive the check in payment of the note. There was not such an extension of credit on the note, as to discharge the maker.

The motion for a new trial is denied.

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Cram v. Dresser.

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CRAM v. DRESSER.(a)

In an action for the recovery of rent, upon a lease which provided for the landlord's entering on the premises to make repairs during the term, the tenant cannot *recoup* his damages occasioned by negligent and tortious behavior of the landlord and his servants, in making such repairs.

The injury in such a case, does not arise from the breach of any covenant or stipulation of the landlord; nor does it grow out of the terms or consideration of the contract entered into between the parties. It is as distinct and independent a wrong, as any committed upon the tenant by a stranger.

A wrongful act of the landlord, causing great inconvenience and trouble to the tenant's family, and keeping the demised tenement in confusion and disorder for a long period; cannot be set up as an eviction, where the tenant has continued in possession for a year after the injury ceased.

On a formal lease for one year, was indorsed an agreement continuing it another year at an advanced rent. During the latter term, a second agreement was indorsed, whereby "the within lease" was "extended the further period of one year, without alteration." *Held*, that both the previous instruments were intended by the expression, "within lease."

Sept. 26; Sept. 30, 1848.

COVENANT for one quarter's rent, \$150, reserved in a lease of a dwelling house. Plea, *non est factum*, and notice of set-off, and other special matter, as hereafter stated.

At the trial, before OAKLEY, CH. J., in April last, the plaintiff proved and read in evidence, a lease of the house from him to the defendant, dated March 13th, 1844, for one year from May 1st, 1844, at the yearly rent of \$550. Among other provisions in the indenture of lease, was the following:

"And it is further agreed, that the said party of the first part, or any person or persons by his orders, shall be permitted to enter the said premises, at such reasonable time of the day as he shall think proper, to examine the said premises, or to make such necessary repairs and alterations therein, as he shall think requisite."

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(a) Oakley, Ch. J., was detained, and did not sit in this case.

Indorsed on the lease were two instruments, each signed and sealed by the parties, the first of which was in these words :

*“ New York, September 15, 1845.—It is hereby agreed, that the within agreement shall extend from May 1, 1845, at the rent of six hundred dollars per year. This is the only alteration. All other matters to remain as named within.”*

The second instrument was as follows :

*“ New York, February 18, 1846.—The within lease hereby extended for the further period of one year, first day of May, 1846, without any alteration.”*

The plaintiff having rested, the defendant introduced in evidence, receipts for the rent, showing it paid to February 1st, 1847 ; all the payments, subsequent to May 1st, 1846, being at the rate of \$150 per quarter, and were so receipted.

The defendant then offered to prove, that in the spring of 1846, the plaintiff sent painters into and upon the premises to paint the house ; and offered to prove in his defence, the facts contained in his notice attached to his plea, and which are therein stated as follows :

*“ And also take notice, that the said defendant at the trial of this cause, will, under the said plea above pleaded, also give in evidence, that the said plaintiff, during the occupancy of the said defendant under the lease, and continuance thereof in said declaration mentioned, in disregard of the said defendant’s convenience, peaceable use, and proper enjoyment of the premises in said declaration mentioned, and in violation of the covenants made on the part of the said plaintiff with said defendant, in the indenture in said declaration mentioned, entered said premises with his workmen, laborers and servants, to paint the walls of sundry rooms and parlors in said premises, and by and under his directions, said workmen, laborers and servants, did paint the walls of sundry rooms and of the parlors in said premises, and in such an unworkmanlike manner as to injure, deface and destroy the appearance and decent looks of said rooms and parlors, using the most improper and worthless materials for the same, and merely rendering said rooms and parlors of but*

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little advantage and value to said defendant. That said painting was delayed and protracted to an unreasonable and unnecessary length of time after it was commenced, whereby defendant's family were put to great inconvenience and trouble, and his house kept in disorder and confusion during all said period, so taken up in the said painting of the rooms and parlors thereof. And by reason of the premises, and the said unreasonable and unwarrantable delays in completing said painting, great damage has been sustained by said defendant, which he will seek to recover by way of recoupment of damages, at the trial of this cause."

The counsel for the plaintiff objected to this evidence as irrelevant, and constituting no defence, either in bar or in mitigation of damages. The judge excluded the testimony, and the defendant excepted.

The defendant then claimed, that during the last year, his rent was only \$550, and applying his payments accordingly, there was but \$100 in arrear.

The judge instructed the jury, that on the evidence the plaintiff was entitled to a verdict for one quarter's rent at the rate of \$600 per year; and the jury gave their verdict for \$160. The defendant excepted to the charge, and now moves for a new trial.

*H. Dresser*, for the defendant.

1. The matters offered to be proved by the defendant, were proper by way of recoupment of damages, or to show an eviction of part of the premises by the landlord; and therefore should have been received.

The work was not necessary, as the plea shows. The plaintiff was bound to show it was necessary.

It is to be taken here, that we have shown an injury. As to recoupment, this claim grew out of the same transaction. The authorities fully sustain its application here. (*Reab v. McAlister*, 4 Wend. 483; S. C. in error, 8 *ibid.* 109; *Westlake v. DeGraw*, 25 *ibid.* 672; *Batterman v. Pierce*, 3 Hill, 171; *Van Epps v. Harrison*, 5 Hill, 63; *Barber v. Rose*, 5 *ibid.* 76; *Whitbeck v. Skinner*, 7 *ibid.* 53; *Cleves v. Willoughby*, 7 *ibid.*



83. And see the definition of recoupment, Tomlin's Law Dict. 814.)

It suffices to say, that the doctrine is founded on a failure of the consideration for the liability which the plaintiff seeks to enforce, for which failure the defendant is entitled to redress.

If not entitled to recoup the damages, the testimony offered was sufficient to prove an eviction, within the authorities on that subject in our state. (*Dyett v. Pendleton*, 8 Cow. 727, 731.)

2. The renewal of the lease, on the 18th of February, 1846, for one year from the first of May after, was at the rent of \$550; and, as \$450 had been paid, the plaintiff was entitled to no more than \$100, with interest.

*H. A. Cram*, for the plaintiff.

*1st Point.* 1. The facts set up in the notice, do not make out an eviction.

2. They are not a breach of any contract in the lease, and therefore, are not the subject of recoupment.

The doctrine of recoupment is as yet without definite limits, apparently; but there is no case that goes the length of this.

The entry here was lawful. We were by the lease, the judges of the necessity of repairing. We deemed it necessary, and we entered to paint the house, which was a proper repair. So far, there was no injury or wrong. Then the putting on of bad paint, and the delaying the work too long, were not justifiable; and those acts constitute the wrong.

There was no eviction, no pretence for it. But there was an injury, for which the defendant might maintain an action, but not assumpsit. And there is no case where a recoupment has been allowed, except where assumpsit could be maintained against the party recouping, either on an express or implied agreement.

In *Etheridge v. Osborn*, (12 Wend. 529,) it was refused in an action of covenant for rent, where the defendant sought to recoup damages arising from breach of covenant to repair.

It is defined in *Ives v. Van Epps*, (22 Wend. 155,) as a claim

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to withhold damages, for some equitable reason, and it arises on some stipulation growing out of the same contract.

In *Batterman v. Pierce*, (3 Hill, 171,) there is a rather broader definition by Judge Bronson, viz.: where there is a demand growing out of the same contract *or transaction*. But no adjudged case goes the length of the latter idea—transactions.

Sedgwick on Damages, uses a broader one still; but all his cases are those of fraudulent warranties, or of negligence, growing out of contract; in all of which assumpsit would lie against the party setting it up.

*2d Point.* After the first year expired, the lease and first endorsement made but one instrument, and the words "the within lease," in the second endorsement, had reference to the lease and the first endorsement; therefore, the rent for the third year was \$600. The acts of the defendant, in taking the receipts in which the rent was stated to be \$600, show that this is the proper construction.

BY THE COURT. SANDFORD, J.—There is no difficulty as to the amount of the rent reserved by the agreement of February 18th, 1846. Although it speaks of the *within lease*, and that made in the preceding year was not within the paper, but was indorsed upon it; the whole instrument shows that both were referred to. The lease was to be *extended*; which language was appropriate only to an existing lease. If the first lease alone had been in view, the expression would have been "revived," or something equivalent. The existing lease which was to be extended, consisted of the two instruments of March, 1844, and September, 1845, the one within and the other upon the paper, on which the agreement in question was written. And a reference in the latter, either to the one or the other, describing it as an existing lease, would necessarily embrace both.

Next, in reference to the principal ground of defence. It is not denied on the part of the plaintiff, that he was liable to the defendant for damages, if the painting of the house were done with as bad materials, and with such needless and harassing

delay, as are stated in the notice. And it is very certain, that the injury as set forth, was one of a serious character. The question is, whether the defendant has any remedy in this action, by way of reducing the amount of the rent due on his lease.

The doctrine of recoupment of damages, on which the defendant relies, was firmly established, by the name of mitigation of damages, or diminution of the plaintiff's recovery, in *Reab v. McAlister*, (8 Wend. 109;) and in cases falling within its principle, is entitled to the favorable consideration of the courts. Without citing the subsequent cases, we may say, that it has been applied to the reduction of the price of goods sold, where there was either a warranty broken, or fraud in the sale, or a distinct agreement relative to the subject matter, which was broken; to diminish the recovery on a contract for labor and materials, which was not executed faithfully; and finally, a tenant's damages by reason of the breach of an agreement to repair, have been admitted in his defence to an action brought by the landlord to recover the rent of demised premises. In *Ives v. Van Epps*, (22 Wend. 155,) Cowen, J., with whom this was a favorite doctrine, cited Tomlins's definition of recoupment, and said, "It is now uniformly applied where a man brings an action for breach of a contract between him and the defendant; and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated. There," he says, "the defendant may, if he choose, instead of suing in his turn, *recoupe* his damages arising from the breach committed by the plaintiff, whether they be liquidated or not. The law will *cut off* so much of the plaintiff's claim, as the cross damages may come to."

The defendant supposes that the doctrine has been carried still further, in the case of *Batterman v. Pierce*, (3 Hill, 171.) It is true, Judge Bronson there says, that "Where the demands of both parties spring out of the same contract or transaction, the defendant may *recoupe*, although the damages on both sides are unliquidated," &c. But the case itself, was an action on a note given for wood sold, and the defence was on an agreement of the seller, forming a part of the contract of sale.

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Indeed, the whole of the learned judge's opinion, shows that he used the word "transaction," as denoting the whole of a contract and its accessories, whether resting in one or more writings, or having mutual or independent stipulations. We do not find any decision going the length of the defence proposed in the case at bar; and we are unable to bring it within the principle of recoupment. The damages claimed to be recouped, do not arise out of the contract between the parties. They were occasioned by a tortious act of the plaintiff's agents; of the same quality as a trespass, although unaccompanied with any force. The acts complained of, are entirely independent of the respective covenants of the parties; as much so, as a trespass or other act of force committed by a landlord, or even by a stranger, upon the tenant. The circumstance that the plaintiff was authorized to enter the premises and make repairs, is to be left out of view, inasmuch as it does not justify the wrong alleged. Those wrongful acts, therefore, stand as unjustifiable injuries to the defendant's possession of the demised premises, committed during the term and long after the contract of letting. We do not perceive how they can be regarded as growing out of that contract, or even out of the same transaction, in the sense in which Judge Bronson made use of that word.

Let us suppose that an action is brought for the price of a horse, and the defendant should plead, that the next week after the sale, the plaintiff without permission, took the horse out of the defendant's stable, drove him out of town, and foundered him. Would such a plea be maintained, either as an entire defence, or by way of recoupment? Yet it appears to us, that the foundering of the horse in the case put, is no more remote from the contract or transaction of the sale, than is the tortious behavior of the plaintiff's servants from that of the lease, in the case before us.

As to the argument, that the testimony offered would prove an eviction, it is evidently an afterthought. The notice does not allege any thing of the kind. It proceeds expressly for a recoupment of damages; and the facts stated, taken in connection with the defendant's continuance in possession for more

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than a year after they occurred, would not support a plea of eviction, if it had been pleaded in form.

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## H. C. BEALS &amp; Co. v. R. TERRY &amp; Co.

A usage of trade, to the effect that on a contract to deliver flour of a particular mark or brand, a delivery of flour of equal or better quality, of a different mark or brand, will satisfy the contract; was held to be inadmissible.

On the default of the vendor in a contract to sell and deliver goods at a specified time, for a price then payable, the measure of damages in an action by the vendee, is the difference between the contract price, and the market value at that time, with interest on such difference.

The same rule applies against a guarantor of the vendor's fulfilment of the contract.

Sept. 13; Sept. 30, 1848.

ASSUMPSIT, on the guaranty of a contract, with the money counts, tried before OAKLEY, CH. J., May 12th, 1848. The contract was in writing, and with the guaranty, were in these words:

"For value received, we have this day sold, and agree to deliver to Messrs. Roderick Terry & Co., in the city of New York, two thousand barrels superfine flour, 'City Mills, Rochester,' at six dollars per barrel, payable cash on delivery of each parcel; to be delivered at our option, in all the month of June next, in parcels of not less than 200 barrels each. Any variation from superfine, to be settled at the usual rates of difference.

"CLARK & COLEMAN.

"*New York*, March 26th, 1847."

[Endorsed,]

"*Messrs. Clark & Coleman*, will please deliver to H. C. Beals & Co. the within flour, as per contract—they paying you for same as received.

"RODERICK TERRY & Co."

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"For a valuable consideration, we do hereby guarantee the fulfilment of the contract, as within specified.

"RODERICK TERRY & Co."

"New York, May 25th, 1847."

On the 30th June, 1847, the plaintiffs presented the contract to Clark & Coleman, tendered to them \$12,010, for the price of the flour and half inspection, and demanded a delivery of the flour specified in the contract. They replied that they had not the flour, and could not deliver it. They offered to deliver flour, other than "Rochester City Mills," on the contract. The plaintiffs immediately advised the defendants of Clark & Coleman's default. The market value of "Rochester City Mills" flour at the end of June, 1847, was variously estimated by witnesses, at from \$8 75 to \$7 25 per barrel. It appeared that there was none of that brand of flour in the market, after June 21, 1847; that there was a considerable decline in the price of flour generally, between that date and June 30th, so that flour equally as good as "Rochester City Mills," was selling on the 30th, at \$7 25 per barrel. Particular brands of flour, which are highly esteemed, frequently maintain their price in the face of a general fall in the market, to the extent of a dollar per barrel; especially, when the supply of such brand is small.

The plaintiffs proved that they paid the defendants \$4500, for an assignment of Clark & Coleman's contract.

The defendants offered to prove, that there was no other kind of Rochester City Mills flour, than *superfine* Rochester City Mills flour; which was objected to and excluded. They also offered to prove, that on the 30th of June, 1847, Clark & Coleman offered to deliver to the plaintiffs, on the contract, flour of a quality equal to or better than the "Rochester City Mills" flour; of the brands, "Hopeton," "Allen's Creek," "Le Roy Mills Extra," and "M. Holmes, Rochester;" which evidence was objected to by the plaintiffs, and excluded by the judge.

The defendants also offered to prove, that by the usage of the trade in flour in the city of New York, it was customary on contracts for the delivery of particular brands of flour at a future day, to deliver other brands of flour of equal quality in

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fulfilment of such contracts. This evidence was objected to by the plaintiffs, and excluded by the judge.

The judge charged the jury, that the rule of damages in the case, was the difference between the market value of the flour in question on the 30th June, and the contract price, with interest. The jury found a verdict for the plaintiffs, for \$4246 15 damages; and the defendants move for a new trial.

*E. Terry*, and *D. Lord*, for the defendants.

*D. D. Field*, for the plaintiffs.

BY THE COURT. VANDERPOEL, J.—The principal questions are, whether the judge submitted the proper rule of damages to the jury, and whether he properly rejected the evidence offered by the defendant, that there was a usage of trade in flour contracts for the delivery of flour at a future day, to deliver other brands of flour of equal quality.

The rule of damages, as laid down by the Chief Justice at the trial was, the difference between the market value of the flour on the thirtieth of June, and the contract price, with interest on such difference. This is the true rule. (*Clark v. Pinney*, 7 Cowen, 681; *Dey v. Dox*, 9 Wend. 129; *Davis v. Shields*, 24 Wend. 322.) In all those cases, it was held, that when there is a default in the vendor in a contract to sell and deliver chattels, the measure of damages in an action by the vendee is, the difference between the contract price and the market value of the chattels when they should have been delivered by the contract. The reason of the rule, says Nelson, J. in *Dey v. Dox*, is conclusive, to wit, that such damages, added to the contract price which the vendee has not parted with, will enable him to buy the article in the market. Why should a different rule be applied in this case. It is said that this was not a contract for a specific marked number of barrels of flour; that the spirit of the contract would have been satisfied by the delivery of other flour of equal quality; and that the judge improperly rejected the evidence offered to show that at the time of the maturity of the contract, Clark and Coleman of-

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ferred to deliver other brands of flour of equal or better quality. This evidence was not admissible, unless the usage of trade is potent and authoritative enough, in a case like this, to justify the delivery of other brands than those contracted for. The rule which forbids the admission of parol evidence to contradict or vary a written contract, is not infringed by any evidence of usage respecting the subject to which the contract relates. (1 Greenleaf's Ev. § 292.) Proof of usage is admitted, either to interpret the meaning of the language of the contract, or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal and obscure. (Ibid.; 2 Sumn. R. 569; *Cutter v. Powell*, 6 T. R. 320; *Vallance v. Dewar*, 1 Camp. 503; *Noble v. Kennaway*, 2 Doug. 510.) There is nothing equivocal in this contract; nothing to require the aid of any usage, or mercantile understanding, to ascertain the meaning of any of its terms or phrases. We took occasion, in the case of *Hone v. The Mutual Safety Insurance Co.*, (1 Sandf. 137;) to express our repugnance to the practice of setting up particular usages or customs, to control the liabilities of parties under the common law, and our entire concurrence in the doctrine of Justice Story, so clearly laid down and so forcibly expounded by him in the case of the *Schooner Reeside*, 2 Sumn. 567. We cannot recognize a usage which will authorize a party to deliver one article in fulfilment of a contract, positively to deliver another; which will justify him in delivering the fabrics of one mill or manufactory, when he has expressly contracted to deliver those of another. The injustice of such a rule is rendered manifest by the evidence in this case. It is proved, that when the supply of flour is small, a particular brand will often maintain its price, in the face of a general fall of one dollar per barrel. Suffice it to say, that one of the contracting parties wants a particular brand, and the other agrees to deliver it to him; and it is not in law or sound reason a good answer for the vendor to say, "I offered you not the article I contracted to deliver, but one just as good." The vendee may, at the time of the contract, have the most conclusive reasons for contracting for that particular brand, and we cannot on any sound principle hold the contract satisfied by



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the tender of another, which the witnesses may deem equally good.

Nor, do we deem the point well taken, that the judge improperly rejected the evidence offered, that there was no other kind of Rochester City Mills flour, than superfine Rochester City Mills flour. We cannot conceive, how it could, legitimately, have influenced or varied the natural import or meaning of the contract. The verdict is larger than we would have found, had we been in the place of the jury; but we have not been able to conclude that the damages are so excessive as to warrant our interference on that ground.

The motion for a new trial is, therefore, denied.

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KING v. DOWDALL.

The statute permitted a non-resident plaintiff to sue in a justice's court, by a short summons, having not less than two nor more than four days to run. He could also sue by the ordinary summons, having not less than six nor more than twelve days to run. Such a plaintiff sued by a summons returnable five days from its date. *Held*, that the justice had no jurisdiction to proceed in the suit.

Where Sunday is an intervening day, it is counted in computing statute time.

Sept. 27; Sept. 30, 1848.

CETIORARI to one of the assistant justices courts. The facts are sufficiently stated in the opinion.

*T. E. Tomlinson*, for the plaintiff in error.

*G. A. Curtis*, for the defendant in error.

BY THE COURT. OAKLEY, CH. J.—Dowdall sued King in the court below by a summons, dated January 12th, and returnable January 17th, 1848. Dowdall was a non-resident, and the 16th day of January was Sunday. The defendant, at the return of the summons, appeared and moved that it be

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quashed and the suit dismissed, on the ground that it was returnable in five days.

The justice overruled the motion. The parties then joined issue, proceeded to trial, and the plaintiff recovered a judgment. The defendant seeks to reverse the judgment, both on the merits, and on the preliminary objection to the process.

We will first consider this objection. The law on the subject undoubtedly is, that a non-resident plaintiff may take out a short summons, having not less than two nor more than four days to run, or a long summons, having not less than six nor more than twelve days between its date and return. He has the option to take the one or the other, on giving the prescribed security, if he take the former. The difficulty here is, that the summons was neither long nor short. It is a summons of five days, if Sunday is to be counted as one.

The question then is, whether Sunday is to be counted in the computation of time on this process.

We know of no rule or principle by which it is to be excluded from the computation where it is an intermediate day, and we supposed the law on the subject was settled. The defendant in error has brought to our notice the cases in the Massachusetts Reports, cited in Mr. Hill's note to 2 Hill, 376. It suffices to say, that the rule indicated by those cases, is not the rule in this state, and whether those decisions were well founded or not, we cannot follow them. (*Ex parte Dodge*, 7 Cowen, 147; *Columbia Turnpike Road v. Haywood*, 10 Wend. 422; *Anonymous*, 2 Hill, 375, and note b., page 376.)

The law is established here that Sunday must be computed when it is an intermediate day, and the objection to the process is fatal. The court below was wrong in disregarding it, and the proceeding was without legitimate authority.

We have a discretion as to costs; and as the error here was purely the act of the magistrate in the issuing of the summons, the judgment will be reversed without costs.

Judgment reversed.

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Suydam v. Clark.

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## SUYDAM, REED &amp; Co. v. CLARK &amp; COLEMAN.

Where the bought and sold notes delivered by a broker to the respective parties, on a sale of produce, differ in a material point, no contract is effected between the parties.

So held, where on a sale of one thousand barrels of flour, the bought note expressed that seven hundred and fifty barrels was to be delivered when it arrived, not later than three days ; and the sold note expressed that the whole was to be so delivered.

Where flour was deliverable upon a day certain, the delivery of an order on a barge, in the hold of which the flour is deposited, is not a compliance with the contract ; there being no actual delivery or tender of delivery of the flour itself, on the day specified.

Evidence of a custom or usage of trade, that the delivery of an order for flour by the seller to the buyer, the receipt thereof by him, and his presentation to the drawee of it, the seller not being notified of the non-acceptance of the order, is a delivery of the flour sold ; *held*, to be inadmissible.

Sept. 14 ; Sept. 30, 1848

ASSUMPSIT, to recover the difference on a contract of the defendants to purchase flour, which not being performed, the flour was re-sold at their risk.

The cause was tried before the Chief Justice, on the 14th of April, 1848. The plaintiffs called W. L. Roberts, who testified that he was a produce broker in this city, and made the sale and purchase of the flour between the parties. The following is the bought note which he sent to the plaintiffs :

" No. 274.

" *New York, July 13th, 1847.*

" *Gent* :—We have this day sold for your account, to Clark & Coleman, 1000 barrels superfine flour, whereof 750 barrels are 'T. Wiman,' at \$6 per barrel ; and 250 barrels 'Scio,' at \$5 87½ per barrel.

The 750 barrels to be delivered when it arrives, not later than three days ; and the 'Scio' to be marked 'Genesee.'

" ROBERTS, BRO'S., *Brokers.*

" *To Suydam, Reed & Co.*"

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The following is the sold note which he sent to the defendants :

"No. 274.

"*New York, July 13th, 1847.*

"*Gent* :—We have this day bought for your account, of Suydam, Reed & Co., 1000 barrels superfine flour, whereof 750 barrels are "T. Wiman," at \$6 per barrel ; and 250 barrels 'Scio,' at \$5 87½ per barrel. To be delivered when it arrives, not later than three days ; and the 'Scio' to be marked '*Gene-see*.'

"ROBERTS, BRO'S., *Brokers*.

"*To Clark & Coleman.*"

It appeared, that on the 16th July, a barge arrived having on board 650 barrels of "T. Wiman" flour for plaintiffs, and about 9 A. M., an order on the barge in these words, was delivered to the defendants :

"*New York, July 16, 1847.*

"*Captain of Barge Chicago*, will please deliver Messrs. Clark & Coleman, six hundred and fifty barrels 'T. Wiman' flour, and oblige,

"SUYDAM, REED & Co.

"Pier Six. Balance out of store."

The defendants sent this order to the broker on the 17th, with a written notice indorsed, that "The time for delivery of the flour expired yesterday ; the boat cannot deliver it to-day, and we have been forced to send other flour in place of it, as the ship cannot wait." They sent him a formal note on the same day, declining to receive the flour.

Roberts further testified, that he bought this flour for the defendants to ship by the *Piscatore*, on the 16th of July. The ship did not sail till four or five days after that. On his suggesting it, the defendants consented to take and did take the "Scio" flour.

A clerk for the plaintiffs proved, that they received notice of the arrival of the boat, early on Friday morning, the 16th July. Plaintiff had the "Scio" flour in store before the sale ; and the balance of the 100 barrels of "T. Wiman" flour, was put in store on the 14th, after the sale, in a lot of 123 barrels. On Monday, witness presented a bill for payment of the whole

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flour. The defendants paid for the Scio, but refused to pay for the Wiman flour, saying they would not take it. Witness gave them a notice, that the Wiman flour would be sold on their account, and they would be called on for the difference.

The usage is to send an order to the parties, when the flour is on the barge. When the flour is at the store, the parties send to the store for it. It is customary to have flour inspected on sales, and for the seller to attend to it. Has known both parties to attend to it. Each party pays half the inspection. The loss on this sale was 75 cents per barrel, making \$562 50.

The Captain of the barge Chicago proved, that he had on board, 664 barrels of "T. Wiman" flour for Suydam, Reed & Co. It arrived on the night of the 15th July, from Troy. The order for 650 barrels, was presented by the defendants about ten o'clock next morning. Another barge of the same line lay between the Chicago and the dock. The captain told the person who had the order, that he would give him the flour when he arrived at the dock. If it had been urgent, the captain testified he could have delivered it immediately. The person did not seem to be urgent. The Chicago delivered goods on that day. The flour was in the forward hold, immediately under the hatch, and could have gone over the other boat. Was ready to deliver at any time when the barge could get to the dock. The same person called on Saturday, and said he wanted the flour. The captain put him off as he had before, although he could have delivered it, if it had been urgently required. The barge between him and the wharf, was discharging all day Friday. It was one of the same line. The captain did not tell the defendants clerk he could land the flour. Told him it could not be landed till Monday morning, and then it would be. He made no objections. The flour in the barge, was the "T. Wiman" flour, and was the same contemplated in the order.

DAVID Dows, for the plaintiffs, testified he is in the flour business. The usage in the flour trade on a contract of sale is, that about the time of the contract expiring, the party gives an order on the boat, or a distant store, and it is accepted as delivery. If I sell flour to be delivered in the month of May, and in the

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course of that month deliver an order, and it is accepted, it is considered a delivery of the property.

It is usual for the captains of the boats, under the direction of the holders of the order, to deliver the flour on the dock, turn up the barrels, and have it inspected. It is customary for the captain to have the inspection done. He notifies the inspector. The trade have considered the acceptance of the order as a delivery of the property.

If the flour is not delivered on presentation of the order, the custom is, that the purchaser must return the order to the seller, or he is considered as satisfied.

The plaintiffs counsel then offered to prove as the usage of the trade, that the delivery of the order to the purchaser, and the receipt thereof by him, and the presentation thereof by him, and the seller not being notified of the non-acceptance of the order, is a delivery of the property.

The judge refused to receive the testimony, and the plaintiffs counsel excepted.

The defendant's counsel moved for a non-suit, on the ground that the broker's notes of the contract delivered to the respective parties varied, and did not constitute a contract, and none had been proved by the plaintiffs. And that the plaintiffs had not proved a delivery of the flour within the time contemplated by the contract. The judge granted the motion, and the plaintiffs counsel excepted.

*S. Sherwood*, for the plaintiffs, cited 14 John. 485 ; 3 Wend. 112 ; 26 *ibid.* 363.

*A. S. Johnson*, for the defendants, cited 3 Wend. 459 ; 26 *ibid.* 341 ; 5 Barn. & Cr. 436 ; 9 Mees. & Welsb. 600 ; 2 Camp. 326 ; 3 *ibid.* 274 ; 7 Dowl. & Ryl. 131.

BY THE COURT. VANDERPOEL, J.—We think, the variance here is fatal. The broker was the agent of both parties ; he must be deemed to have been employed by the one to buy, and by the other, to sell ; and the notes which he delivers to the parties, evidence their contract. According to the note delivered

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to the plaintiffs, the 750 barrels only were to be delivered when it arrived, not later than three days; whereas, according to the note delivered to the defendants, the whole quantity, a thousand barrels, was to be delivered on its arrival, not later than three days. By the latter note then, the obligation of the defendants, to take the thousand barrels, was conditioned, on its arrival and delivery, within three days. Whether the terms of the latter note were more or less beneficial to the defendants than the former, cannot be material. Both parties had the right to determine that question for themselves, when they entered into the contract.

In *Grant v. Fletcher*, (5 Barn. & Cres. 436,) it was expressly held, that the broker is the agent for both parties, and as such may bind them by signing the same contract, on behalf of buyer and seller. But that if he does not sign the same contract for both parties, neither will be bound, and that where a broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. (*Davis v. Shields*, 26 Wend. 341; *Peltier v. Collins*, 3 Wend. 459.)

2. The point is also well taken, that the flour was not delivered within the time specified in the contract. Nor does the defendants receiving the 250 barrels of "Scio" flour, preclude them from taking this objection. They had a right to receive this, in part fulfilment, and under the expectation, that the whole would be delivered according to the contract. The three days, within which the delivery was to be made, expired on the 16th of July; and the defendants could not, on that or the following day, succeed in getting possession of the flour. (*Cox v. Todd*, 7 Dow. & Ry. 131.) That this is an article, as to which the time of delivery may be very important to the purchaser, is apparent from the evidence in this case. It shows, that the defendants wanted to ship it to England by a particular vessel, and the vessel had to be laden before delivery of the flour was offered.

3. The judge properly rejected the evidence of custom, offered by the plaintiffs in regard to delivery. We have lately expressed our repugnance to the idea, that well established principles of law should yield to local customs or usages. What is deli-

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very, is a question of *law*, and not of *opinion*. It is not within the legitimate province of *custom*, to control, or at all interfere, with a question of this kind.

The motion to set aside the non-suit is denied.

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STEVENS and others v. STRANG and others.

A note payable to a fictitious person, is recoverable as payable to bearer, under the statute, on proof that it was negotiated by the makers.

Evidence stated, which was held sufficient to entitle the holder to recover on such a note.

Sept. 11th ; Oct. 7th, 1848.

THIS was an action of assumpsit commenced by declaration, which contained the money counts and a count upon an account stated, and on which was indorsed a copy of a promissory note with a notice that the same was the only cause of action on which the plaintiffs relied.

The plea was the general issue.

The cause was tried before Chief Justice OAKLEY, without a jury, on the tenth day of May, 1848. The plaintiffs proved the making of the note by the defendants, and it was read as follows :

" \$466 40.

" Six months after date, we promise to pay to the order of Messrs. Ebenezer Stevens & Sons, four hundred sixty-six and 40-100 dollars value received.

" BENJ. H. STRANG & Co."

The plaintiffs counsel then called THOMAS M. ADRIANCE, who testified :—I am in the plaintiffs employ. The title of the firm is " Ebenezer Stevens' Sons." I have been with the old and new firm, near thirty years. Have been in plaintiffs employ ever since the formation of the present firm. There was



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formerly a firm of "Ebenezer Stevens & Sons," but it does not exist now. It ceased to exist some twelve years ago. Ebenezer Stevens is dead. He died in September, 1823. He was the father of the plaintiffs. There was no such firm as Ebenezer Stevens & Sons, at the time the note in suit was given, nor is there at the present time.

The plaintiffs counsel offered to prove by the witness the consideration of the note, and the circumstances attending the making and negotiating the note, for the purpose of showing that the title of the note was in the plaintiffs, and they had a right to sue upon it. The defendants counsel objected to the evidence, but the objection was overruled, and the defendants excepted.

The witness then testified :—The note was given for goods sold and delivered by the plaintiffs, under the firm of Ebenezer Stevens' Sons, to Benjamin H. Strang & Co. This is the order :—(The defendants counsel objected to the reading of the order, but the objection was overruled, and the defendants excepted.) The order was then read in evidence, and is as follows :—

" Please deliver Messrs. Benjamin H. Strang & Co.,

1. One half pipe Otard brandy, 1842.

2. Two do. A. Seignette.

Sold per your order.

G. H. STANTON.

New York, May 28, 1847.

(Endorsed.)

BENJ. H. STRANG & Co."

On being cross-examined, the witness testified :—The goods were sold by me to Stanton, the broker of the defendants. All I know, except what appears in the order, was what Stanton told me. I delivered the goods myself to a cartman, who presented the order with the indorsement on the back.

The plaintiffs' counsel then offered to read the note in evidence, to which the defendants objected. The court overruled the objection, and the defendants excepted. The note was then read in evidence.

The plaintiffs here rested ; and the defendants moved for a

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nonsuit, on the ground that the plaintiffs had not shown any title to the note, or any right to sue upon it in their names. The court overruled the motion, and defendants excepted.

The Chief Justice thereupon rendered judgment for the plaintiffs for the amount of the note, and interest.

The defendants now move that a nonsuit be entered.

*M. G. Harrington*, for the defendants.

*G. Gibbs*, for the plaintiffs.

BY THE COURT. SANDFORD, J.—By the statute, promissory notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer. (1 R. S. 768, § 5.)

In this case, the proof was abundant to show, that Ebenezer Stevens & Sons were fictitious persons, within the meaning of the act; and also that the insertion of that name as the payees was an inadvertence, which might well occur under the circumstances.

The evidence which the defendants object to as proving a cause of action distinct from the note, (the declaration having a notice attached that the note was the only cause of action,) was given to prove the plaintiff's title to the note, and that the makers negotiated it. It was pertinent and proper in that view, and was sufficient to bring the case within the statute.

Motion for new trial denied.

**SATTERLEE v. FRAZER.**

A party cannot enforce an agreement made by him with an attorney to give him a part of a debt as his compensation for collecting it. *Held* accordingly in an action against the attorney, by one who had made a sub agreement with the attorney to collect a demand placed in the plaintiff's hands for collection.

An actual demand must be proved, in order to maintain a suit against an attorney at law, for money collected by him.

Sept. 25th ; Oct. 7th, 1848.

**CERTIORARI** to the marine court. Frazer sued Satterlee in the court below, and declared against him, "That the defendant is an attorney at law, and as such received for and on behalf of the plaintiff, a large sum, viz. \$60, which he undertook and promised to pay the plaintiff. Nevertheless the defendant, though often requested so to do, has and does wholly refuse. Also, on the money counts and account stated." The case which the plaintiff sought to prove on the trial, and which the court below decided that he established, was this :

Stephen Barker, having a demand of \$110 against Peter A. Griffin, deceased, of whose estate Mr. Kane was administrator, employed the plaintiff as his attorney to collect it, and agreed that he should have half of the demand for collecting it. The plaintiff employed the defendant as attorney in the matter, and it was agreed between them, that the defendant should have one-half of the plaintiff's share of the demand for the services of the defendant in collecting it or procuring it to be paid.

The demand was collected by the defendant, who paid to Barker fifty dollars, which he received in full of his share of the demand. But the defendant never paid anything to the plaintiff.

(It was alleged by the defendant, and he gave proof to that effect, that the arrangement between him and the plaintiff was abandoned ; and that he collected the demand under a subsequent retainer directly from Barker. In the view taken by this court, it is unnecessary to state the evidence.)

The defendant in the court below, objected to the plaintiff's

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claim, that no demand upon him had been proved, but the objection was overruled, and a judgment for \$27 50, rendered for the plaintiff below.

*C. V. S. Kane*, for the plaintiff in error, relied upon the merits, and the point raised below ; and insisted that the agreement set up by Frazer was contrary to law.

*Winslow & Morris*, for the defendant in error.

BY THE COURT. SANDFORD, J.—Without looking into the merits of the question of fact disposed of in the court below, we think there are two grounds upon which the judgment must be set aside.

1. The defendant below was sued as an attorney at law, for money collected by him as such, for the plaintiff and on his retainer. Now, there is no point better settled than this, that such an action cannot be maintained without proof of an actual demand of the money. Our reports are full of decisions to this effect, and it would be a waste of time to cite them at large. In this case there is no evidence of a demand.

2. The agreement by which the plaintiff acquired an interest in the demand against the estate of Griffin, as well as that which he seeks to enforce against the defendant ; was a contract with an attorney at law, employed to collect a debt, to give him a part of the debt as the compensation for his services in collecting it.

Such contracts were void by the law of this state, as it existed when these arrangements were made ; and they could not be enforced either at law or in equity. (*Arden v. Patterson*, 5 J. C. R. 44 ; *Matter of Bleakley*, 5 Paige, 311 ; *Merritt v. Lambert*, 10 *ibid.* 352 ; S. C. by the name of *Wallis v. Loubat*, 2 Denio, 607 ; *Berrien v. McLane*, 1 Hoff. Ch. R. 421.) The code of procedure appears to have changed the law in this respect, and to enable parties to make such bargains as they please with their attorneys. (Code of Proc. § 258.) The judgment must be reversed.

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Sandford v. Conant.

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## SANDFORD v. CONANT.

An assignment of a party's "right and title to certain insurance money my due, and now in the hands of," &c., will pass the right of such party to the money due upon the insurance, although it has not been paid to the person mentioned as having received it.

S. having a right to receive insurance money from C., or from parties who had insured C. for his benefit, assigned his right to N. The money was subsequently received by C. from the insurers. *Held*, that it was money had and received to the use of N., and not to the use of S., and that an action for money had and received, could not be maintained in the name of S.

Sept. 22 ; Oct. 7, 1848.

ASSUMPSIT for money had and received, and on an account stated.

It was proved on the trial, that on the 28th of October, 1846, the defendant, a jobbing merchant in New York, sold to the plaintiff, residing in Southport, Wisconsin, a bill of goods amounting to \$256 48, and received the plaintiff's note at six months. On the 29th October, 1846, he sold to the plaintiff for cash, to be paid within thirty days, another bill of goods of \$95 36. The goods were shipped to Southport, and the defendant insured them. No policy or contract of insurance in writing was made by the defendant, but the premium was charged in the bills of goods, and the amount included in the note of the plaintiff. The note, as well as the bill of goods for cash, remained unpaid at the time of the trial. The defendant effected an insurance in form, on these goods, with ten per cent. added to the invoice price; and on the 26th of April, 1847, received the entire amount from the insurers, the goods having been lost by the perils insured against, on their way to Southport. The defendant credited the sum thus received, to the plaintiff, against the debt due him from the latter.

On the 6th day of January, 1847, which was subsequent to the loss of the goods, the plaintiff assigned and transferred to Nixon & Bartlett of New York, in part payment for merchandise sold to him at the time, his claim against the defendant in

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respect of the insurance. The transfer was under seal, and as expressed therein, it assigned to N. & B., all the plaintiff's "right, title, and interest, in and to certain insurance money my due, and now in the hands of" the defendant, "the amount being \$349 74, insured by him for my benefit on goods shipped and lost on steamboat Boston;" with full power to receive and collect the same.

Written notice of this assignment was given by Nixon & Bartlett to the defendant, on the 25th of January, 1847.

A verdict was taken for the plaintiff, subject to the opinion of the court.

*R. Goodman, and E. S. Van Winkle, for the plaintiff.*

*E. W. Chester, for the defendant.*

**BY THE COURT. OAKLEY, CH. J.**—The plaintiff claims to recover for money had and received, on the ground that the insurance money for the goods, was money received to his use, which he had assigned to Nixon & Bartlett, before the defendant had any right to retain it by way of set-off. And if wrong in this, he claims to recover under the count upon an account stated, charging the defendant as an original insurer of the property. The defendant contends, 1st. That there were no moneys in his hands, at the time the assignment was made by the plaintiff to N. & B., and thus nothing passed to them by the assignment. 2d. If the assignment were operative, it vested in N. & B. the right to receive money, and when received, it was their money and not the plaintiffs, and they alone could sue for it. 3d. It was the defendant's right to receive the insurance, and retain it towards his demand against the plaintiff. And 4th. He had a right to set off such demand against the money received.

*First.* Did the right to the insurance pass by the assignment to Nixon & Bartlett? It purports to transfer the insurance money then in the hands of the defendant, when in fact he had received no money, and had merely a right of action. It also assigns all the plaintiff's right to the insurance money then due

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to him; and on a liberal construction of the instrument, we hold it sufficient to assign whatever demand the plaintiff then had against the defendant, whether it was for money received, or was a right to recover against him as an insurer.

*Second.* Waiving the defendant's claim to retain the insurance money, was it received by the defendant, to and for the use of the plaintiff, so that the action can be maintained in his name? We think Nixon & Bartlett are mistaken in their view of the relation existing between the plaintiff and the defendant, when this money was received by the latter. It was not received for the plaintiff, because he had parted with all his interest in it, and the defendant was notified of that fact. The money was received for Nixon & Bartlett, to whom it had been assigned. If the suit were upon a bond, or other demand not assignable at law, the suit would necessarily have been in the name of the assignor; but this action is brought on the ground, that the defendant has received money to which the plaintiff is equitably entitled, and it should have been in the name of the party thus actually entitled to it. Nixon & Bartlett should have sued in their own names.

If the contract be viewed as a direct insurance founded on the defendant's agreement and receipt of the premium, then the pleadings are entirely insufficient to sustain the suit. That contract could only be enforced in an action on the case, or in a direct suit as upon an express insurance. The money cannot be recovered on a count for a balance due on an account stated.

Without looking into the remaining points, we must direct a judgment of nonsuit to be entered.

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Bell v. Quin.

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## BELL v. QUIN.

Where an act is expressly prohibited by a statute, all contracts growing out of its performance are void.

So a promissory note given by one of two parties to the other, for the latter's share of the profits received by the former in a transaction forbidden by law, cannot be recovered by the payee or his voluntary assignee.

The charter of a municipal corporation enacted that no member of the common council, during his official term, should be interested in any contract, the expenses or consideration whereof was to be paid under any ordinance of the common council. A member of the board was interested with the defendant, in a contract for supplying the corporation with coal, and received the defendant's note for half the profits of the contract. *Held*, that his assignee could not recover the note against the defendant.

Sept. 15 ; Oct. 7 1848.

ASSUMPSIT, on a promissory note for \$1178 24, made by the defendant, dated August 17th, 1842, payable on demand to the order of Williams & Ferguson, and by them indorsed in blank.

The cause was tried June 15th, 1848. The note and indorsement were proved, upon which the plaintiff rested.

The defendant then called as a witness, GEORGE FERGUSON, Jr., who testified that he was one of the firm of Williams & Ferguson, in 1842. The note was given for their share of the profits on a contract made by the defendant with the Commissioners of the Alms House of the city of New York, for the delivery of coal to the alms house. At the time the contract was made, and when the note was given, David F. Williams, the other member of the firm, was the assistant alderman of the fourth ward of the city of New York.

The defendant then read and proved in evidence the contract referred to, which was signed by the defendant and by the chairman of the Alms' House Commissioners. It was dated June 3d, 1842, and thereby the defendant was to deliver three thousand tons of coal of 2240 pounds, at certain prices, and Mr. Williams was to be the judge of the quality of the coal.

It was admitted that the coal was delivered in pursuance of the contract, and payment therefor received by the defendant.



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Ferguson further testified that the contract was made after his firm had agreed with the defendant. The note was assigned to the plaintiffs in January, 1843, for the benefit of creditors.

Cross-examined, he testified that their bargain with the defendant was not in writing. Their firm had had the previous contract with the alms house, but this year Mr. Williams being a member of the board of assistant aldermen, would not take the contract, and the witness had concluded to propose for it individually, but did not on the defendant's agreeing that if he got the contract, W. & F. should receive half the profits. Williams & Ferguson were to attend to purchasing the coal, and were to share half the losses and half the profits. They loaned the defendant money for expenses, which he subsequently paid back. Mr. Williams went to Pottsville on the matter of purchasing the coal. They had a settlement with the defendant, of their claim growing out of the contract, and the note in suit was given on that settlement. The defendant attended to the delivery of the coal, and paid all the expenses. He alone was known in the transaction. There was nothing but a computation of the profits brought into the settlement, and the note was given for half of the net profits.

The defendant then proved that the expenses of the alms house were included in the appropriations of the year 1842, by an ordinance of the common council.

The testimony being closed, a verdict was taken for the plaintiffs, subject to the opinion of the court.

*S. P. Nash*, for the plaintiffs.

The facts proved by the defendant do not invalidate the note in the hands of the plaintiffs.

1. The note was given for money in the hands of the defendant, received to the use of the payees, and he cannot set up the illegality of the executed contract on which he received it. (*Tenant v. Elliot*, 1 Boss. & Pull, 3; *Farmer v. Russell*, *ibid.* 296; and see *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannays*, 3 Term R. 418; and *Armstrong v. Toler*, 11 Wheat. 258.)

2. The prohibition in the city charter is merely directory, the

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violation of which should be punished by removal from office. There is nothing in the charter which looks to the avoiding of contracts as the means by which the prohibition is to be enforced. But if so, that remedy should be confined to the party wronged, the corporation. (*Brown v. Duncan*, 10 B. & Cr. 93.)

3. The prohibition in the charter, is merely a municipal regulation in a private statute, not a public general law, and a contract in violation of it is not void. (*Ex parte Dyster*, in re *Moline*, 1 Merivale, 155; S. C. 2 Rose Bank. Cases, 349; *Kemble v. Atkins*, 1 Holt, 427, and reporter's note; see also *Johnson v. Hudson*, 11 East, 180; *Hodgson v. Temple*, 5 Taun. 181; *Brown v. Duncan*, above cited.)

That the statute is a private one. (See Com. Dig. Tit. Parliament R. 7.)

A statute which relates to a particular place, or town or county, is a private statute; (4 Coke's Rep. 76; Skin. 350; 1 Bl. Comm. 86.)

Finally, the contract itself is not illegal or in contravention of any statute or rule of law; but it is said to be invalid, by reason of the participation in it of one who was under a temporary incompetency or disability so to participate. The rule relied on does not apply to such cases.

This case differs from such as were immoral, or for a matter prohibited.

All the illegality was wiped away by the only party who could legally take advantage of it, the corporation.

*E. Norton*, for the defendant.

I. The note in suit is void, because it grew out of an illegal transaction. (Story on Promissory Notes, § 189.)

1st. The transaction was illegal, because prohibited by the charter of the city of New York. (Session Laws of 1830, pp. 126, 128, § 11 & 18. Chitty on Bills, 114, (Springfield ed. 136.)

The cases cited on the other side were of agents, who were not permitted to set up illegality, to avoid paying over money received by them.

The arrangement with the defendant, was made by the

payees before he contracted with the city, so that although in form his contract, it was in fact the contract of all three.

2d. The transaction was illegal, because contrary to public policy. (Chitty on Bills, 95; *Cole v. Gower*, 6 East, 110.)

II. The note is void for want of a good and valuable consideration. If it were truly the defendants contract, and not W. & F.'s, there was no consideration.

III. Any defence to the note may be set up against the present holders, as it was past due when it was transferred; and it was not transferred for a present consideration.

BY THE COURT. SANDFORD, J.—The plaintiffs stand in the place of Williams & Ferguson, and cannot recover, unless the latter could have maintained a suit upon this note at the time they executed the assignment.

The amended charter of the city of New York provides that “no member of either board,” (of the common council,) “shall, during the period for which he was elected, be directly or indirectly interested in any contract, the expenses or consideration whereof are to be paid under any ordinance of the common council.” (Laws of 1830, ch. 122, § 11.)

In direct contravention of this statute, and of his duty as a member of the board, Mr. Williams was interested in the contract for supplying the alms house with coal; and while by the contract he was made the judge of the quality of the coal in behalf of the city, by the secret arrangement with the defendant, he was to aid in purchasing and supplying it in fulfilment of the contract.

We have no doubt that the note, given for the share of the profits to which his firm was entitled in this illegal transaction, is void between the original parties. It is void, both because its consideration was the fruit of a positive violation of law, and because the transaction itself was against sound morals and the public interests.

The cases to which we were referred by the plaintiff's counsel, are not sufficient to sustain his positions. In that of *Tenant v. Elliot*, 1 B. & P. 3, the defendant was not a party to the illegal contract. He received the money as the plaintiff's

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agent, and it was held that he could not set up an illegality to keep back the money from his principal. The case of *Farmer v. Russell*, 1 *ibid.* 296, was decided on the same ground, and was not designed to extend the doctrine farther than it had been held in the previous decision. In *Faikney v. Reynous*, 4 Burr. 2069, the plaintiff had lent money to the defendant to pay the latter's half of a difference they had jointly lost in illegal stock jobbing, and a bond was given for its repayment. The bond was adjudged good, because the plaintiff was not concerned in the use which the defendant chose to make of the money advanced. The court said the bond did not appear to have been given on an illegal consideration. In *Petrie v. Hannay*, 3 T. R. 418, the King's Bench, against the opinion of Lord Kenyon, decided, that one party who with the consent of the other, paid the joint loss incurred in such a transaction, to a broker, whom they had employed to settle and pay the difference lost ; could maintain a suit against the other party for his moiety of the money. This decision was one of doubtful authority at the time, and scarcely sustainable upon that in 4 Burr. 2069, on which solely it was reposed by the majority of the court.

It has since been entirely overturned in England by the cases of *Steers v. Lashley*, 6 T. R. 61 ; *Aubert v. Maze*, 2 B. & P. 371 ; and *Cannan v. Boyce*, 3 B. & Ald. 179. Indeed, *Steers v. Lashley*, is directly in point against the plaintiffs in the case at bar.

We were referred to two or three other modern cases in England, as being in favor of a recovery. The courts there appear occasionally to have strained a point, where the infringement of law was peculiarly venial, and injustice might ensue from enforcing the principle. And in one of them, (*Brown v. Duncan*, 10 B. & Cres. 93,) where one partner had omitted to comply with certain revenue regulations, and had violated another, in transacting the business for which his firm brought the suit ; the firm was allowed to recover, because there was no fraud upon the revenue. The court distinguished between that case and those where the object of the statute infringed, was the protection of the public, such as the usury act, the act against stock-

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jobbing ; and the like. And the court said some of the prior cases were decided on that distinction.

In *Armstrong v. Toler*, (11 Wheat. 258,) the court on the authority of the cases in 4 Burrow, 1 Bos. & Puller, and 3 Term Reports, sustained a recovery on the particular transaction ; at the same time assenting to the principle, that a contract growing immediately out of an illegal act ; or connected with its consideration, though a new contract, cannot be enforced in a court of justice.

The plaintiff further contended that the prohibition in the city charter was a mere municipal regulation in a private statute, and therefore a contract in violation of it, is not void. We will not say what the consequence would be, if the prohibition were found in an ordinance of the corporation instead of the statute law. The case in 1 Merrivale, to which we were referred, is in favor of the position that the contract would be void in that event, if positively forbidden, and the ordinance were authorized by the charter. The party in 1 Merrivale, was relieved, because there was not an express prohibition, but the city of London had enacted that if the party did the act, he should incur a certain penalty.

We repeat that the note in question is void, and the plaintiffs cannot recover.

Judgment for the defendant.

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FENBY & JOHNSON v. PRITCHARD.

On a sale on a credit, to be secured by notes as collateral, not yet due, the receipt of the collaterals five days after the delivery of the goods, makes the seller a *bona fide* holder of the notes for a valuable consideration, so as to protect him against any defence which the maker of the notes had against the buyer of the goods.

This was *held*, although at the time of the sale, the notes in question were not specified or described, and were not in fact then in the possession of the buyer.

Sept. 21 ; Oct. 28, 1848.

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Fenby v. Pritchard.

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CASE subject to the opinion of the court. The action was assumpsit on two promissory notes made by the defendant, payable six months after date, to E. W. Pemberton, and indorsed by him; one for \$471 18, dated December 6, 1845, the other for \$396 48, dated January 20, 1846.

The following facts appeared on the trial. Soon after the date of the second note, an agreement was made between the defendant and Pemberton, by which these and other notes of the defendant, were to be delivered up to him, on his paying Pemberton \$1000, and returning to P. merchandise of the value of \$3000, which he had theretofore bought of P. This arrangement was consummated by the defendant, January 31, 1846; and he was then entitled to the notes. For some unexplained cause, the notes were not delivered up to him by Pemberton.

On the same 31st of January, Pemberton bought of Oliver P. Mills, his bills of exchange on a house in London for about £1000, on a credit of forty-five days. P. was to give his own notes at that date, and secure the same by collateral notes. He gave his own notes, and he delivered the collateral notes to Mills prior to the 15th of February; it was probably on the 8th, and was not before. Among these collaterals, were the two notes in suit. The bills drawn by Mills were protested, and were never paid.

On the 4th of February, 1846, Mills through a broker, bought of the plaintiffs, 500 barrels of flour, for which he was to give them his note at thirty days, with collateral security by notes. No particular notes were specified. The flour was delivered on the 5th of February, Mills's own note was given four or five days after, and the collateral notes were furnished to the plaintiffs by Mills, part on the 9th or 10th, and the residue on the 14th to the 16th of February. The two notes in suit were transferred to the plaintiffs as a part of such collaterals, in the first parcel delivered.

Proof was given, that it was customary in New York, on a sale for cash or collaterals, to deliver the property, and then send for the payment a few days thereafter, where the buyer stands fair, and is in good credit. The seller in such cases,

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trusting to the honor of the buyer, and the delivery is absolute. Mills was in good credit and standing, at the time of the sale to him.

*G. M. Ogden, and D. B. Ogden, for the plaintiffs.*

I. By leaving the notes in the possession of Pemberton after they were paid, a possession entirely inconsistent with the fact of payment; the defendant voluntarily gave Pemberton the power to transfer them, and gave strangers good reason to believe that they still remained valid in Pemberton's hands; and the defendant ought therefore to suffer, rather than the plaintiffs, who are entirely innocent.

II. The plaintiffs received the notes in the usual course of trade, for a valuable consideration, and without notice or knowledge of any defence to them. (*Lickbarrow v. Mason*, 2 T. R. 63.)

III. When the plaintiffs received these notes, they had a valid and effectual claim against Mills to have his agreement for the delivery of collateral notes specifically performed. He was then solvent and able to respond; and by accepting these notes, they relinquished that claim, which was thereby satisfied. They therefore parted with a valuable consideration at the time at which they received the notes. (2 T. R. 63, before cited.)

*H. F. Clark, for the defendant.*

I. The notes sued upon were paid and discharged by force of the agreement between the defendant and Pemberton, and the liability of the defendant upon the notes had ceased. Therefore the plaintiffs cannot recover upon them, unless they are to be regarded as *bona fide* purchasers for a valuable consideration.

II. The plaintiffs are not *bona fide* holders for a valuable consideration, within the rule which protects purchasers against the prior equities of third parties. They did not part with any money or property at the time of receiving the notes, or upon the faith and credit of them, but took them as security for an existing debt.

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The notes were not in Mills's possession or mentioned, and Mills did not know of any such notes. Therefore, these particular notes could not have been in the view of either party; and no faith or credit was given to them.

III. The agreement of Mills to give collateral security for the payment of his note for the flour, was not a condition of the delivery. The delivery of the flour was complete and unconditional, and was made upon the credit of Mills alone, and not upon the credit of the notes in suit. It was on his promise to deliver collaterals, not upon any specified securities pledged. It must be a valuable consideration, parted with at the time, in money or property, as established by the case of *Stalker v. McDonald*, 6 Hill, 93.

BY THE COURT. VANDERPOEL, J.—The question is whether the plaintiffs received these notes under such circumstances as to protect them from the alleged payment by the defendant to Pemberton the payee; and this presents, in a form somewhat new, the ever recurring question, when the indorsees of a note are to be deemed *bona fide* holders in a commercial sense, so as to preclude a defence existing at the time of the transfer. From the evidence, it seems that the notes in suit were delivered to the witness Pemberton, in payment for merchandise sold by him; that before he transferred the notes to Mills, an agreement was made between him and the defendant, by which the defendant was to return to Pemberton an invoice of goods, valued at about \$3000, and to pay in cash \$1000; in consideration of which Pemberton was to assume certain liabilities of the defendant; and the return of the goods was to be considered a payment of the notes upon which this suit is brought; that this agreement was consummated on the 31st of January; but Pemberton did not return the notes, and says he cannot tell why he did not return them; that afterwards, he purchased exchange from Oliver P. Mills on a credit of forty-five days, to be secured by the notes of the witness, and by collateral notes; that on the 8th of February he passed to Mills, as such collaterals, the notes in suit.

On the 3d of February, Mills applied to the plaintiffs for the



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purchase of 500 barrels of flour. It was finally sold to him, on the following terms. Mills was to give in payment his own note at thirty days, and collateral security, which was to be *notes*. The flour was delivered to Mills on the 5th of February, 1846, and the collaterals were in pursuance of the contract, delivered about the 14th, 15th, or 16th of February. The note of Mills has not been paid. At the time of the agreement for the sale of the flour, the particular collaterals to be turned out were not specified; but a witness testified, that *collaterals* meant *notes*, when not otherwise expressed. Now, are the plaintiffs such *bona fide* holders for value, as to enable them to recover the notes, notwithstanding the alleged payment of the defendant to Pemberton?

The principle is well established, that receiving the transfer of a note as collateral security for the payment of a pre-existing debt, is not taking it in the ordinary course of trade and for a valuable consideration, as against the equities of the maker. (*Wardell v. Howell*, 9 Wend. 170; *Coddington v. Bay*, 20 Johns. 637.) To protect the holder of a negotiable security, which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, he must not only have taken it without notice, but must also have parted with something of *actual value*, upon the credit or faith thereof. Merely receiving it in payment or security of an antecedent debt, is not sufficient. (*Stalker v. McDonald*, 6 Hill, 93.) After the very able and elaborate opinion in that case, there can no longer be doubt as to what the law is on this subject. But in the application of the principle, the question whether a case comes within the well established rule, still leaves abundant room for controversy. This is not the case of receiving the notes as security for a pre-existing debt, without parting with any thing of value. The giving collaterals, was one and an indispensable condition or consideration, on which the plaintiffs parted with their flour. They would not, when the contract was made, receive the personal responsibility of Mills alone for payment. Had they received the collaterals simultaneously with the delivery of the flour, and as part of the consideration therefor, their title to protection as against the equities of the defendant, would have

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Fenby v. Pritchard.

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been unquestionable. Here the note of Mills, the vendee, was not given when the flour was delivered, but, according to the usage as proved, the vendor generally calls for the stipulated security on a sale to be secured by collaterals, a number of days after the goods are delivered, according to his leisure. Whether the notes were delivered at the time of the delivery of the flour, is not the true test in this case. The true and controlling question is, whether the plaintiffs parted with their flour on the condition and with the understanding that collateral security was to be given. Of this, there can surely be no doubt. The collateral security was one of the inducements to parting with their property. If so, no good reason can be assigned why they should not have the same benefit of the collateral notes, that they would have had, had they received them simultaneously with the delivery of the flour. We therefore hold, that the plaintiffs received the notes in suit under such circumstances as to entitle them to protection against the alleged payment of the defendant to the payee, before they were transferred to the plaintiffs.

It is urged in behalf of the defendant, that these particular notes were not specified as among the collaterals that were to be transferred. We cannot perceive how this can weaken the position of the plaintiffs. Collateral security was with them an indispensable consideration for parting with their property. These notes were offered and accepted, in satisfaction of such consideration. What was general when the contract was made, was rendered specific and certain when the notes were delivered and accepted. It is not pretended that the plaintiffs knew, or are chargeable with notice, that Mills had no authority to pledge or part with the notes; and having been passed before they matured, the plaintiffs are entitled to judgment.

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Clark v. Tucker.

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## CLARK v. TUCKER and LORD.

Where a sale of goods is made on an agreement that the price shall be applied to the payment of a precedent debt, such price must be actually applied by a receipt or otherwise, to bring it within the exception in the statute of frauds, founded on payment of all or part of the price.

In order to constitute an acceptance and receipt of the goods, to take a sale out of the statute, there must be an act of delivery on the part of the seller, as well as an act of acceptance by the buyer.

Where goods in the possession of a factor, were sold by a parol agreement, and a constructive delivery was set up, first by a letter at the time from the buyee's agent to the factor; and second, by a letter a fortnight afterwards, by the seller to the factor; it was *held*, that the sale was void, because the seller did not participate in the act of delivery sought to be inferred from the first letter, and because the buyer did not accept and receive in connection with the second. *Held* also, that the second letter was too late; and that an act of delivery by notice to the factor, must be concurrent, or substantially at the same time that the contract is made.

Whether the taking out of a foreign attachment, (naming a garnishee,) giving bail therefor, and prosecuting it after service; will make the attaching creditor liable in trespass or trover, for goods in the hands of the garnishee, whom the sheriff has summoned, leaving the goods in his possession; there being no direction by the creditor to levy on any specified goods? *Quere*

Sept. 14th; Oct. 28th, 1848.

THE declaration in this cause, contained two counts in trespass for taking certain hats of the plaintiff in the city of Philadelphia, and one count in trover for the same hats. The defendants pleaded not guilty.

Upon the trial before SANDFORD, J. in June, 1848, the plaintiff called as a witness, Nichols H. Babcock, who testified that he was a hatter, and in the spring of 1846, was doing business in the Third Avenue, in the city of New York, having his store and shop on the first floor, and residing in the residue of the building. On the 3d of April, 1846, he found himself insolvent, and at that time he was indebted to the plaintiff in more than two thousand dollars, for borrowed money. Two promissory notes were produced for \$1000 each, made by the witness to the plaintiff, one at nine months, dated Sept. 1st, and the other

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four months, dated Sept. 16th, 1845, which he stated were for the plaintiff's notes of the same amount. lent to him, and paid by the plaintiff. On the note last mentioned, there was an indorsement of \$941 12, dated April 3d, 1846. The witness further testified, that on the 3d of April, 1846, he sold his stock of hats in his store in the Third Avenue, to the plaintiff, who resided at Clyde, Wayne Co. Theodore Clark, the plaintiff's brother, residing in New York, acted as his agent in the transfer. A bill of sale or invoice, was shown to the witness, which he said was made and delivered at the time. This bill was dated April 3d, 1846, and contained a long detail of items of hats, caps, and hatter's stock and fixtures, with the prices carried out. It was footed at \$941 12, and was receipted in full by the witness.

The witness further testified as follows :

The hats amounted to \$941 12, and were endorsed at the time on one of the notes for \$1000. I transferred at the same time, a quantity of hats which I then had in the hands of John W. Kester, in Philadelphia, upon which I had received an advance of about \$891, besides his commission. The hats were invoiced at the time at \$1592, and I considered them worth the invoice price. (The witness was here shown two papers, being an invoice and accounts of sale from J. W. Kester, in letters of January 30, 1847, and February 4, 1847.) There was no bill of sale of the Philadelphia hats; they were transferred on the same day as the others, 3d April. They were not included in the bill of sale; the transfer was verbal. We could not make an inventory of them, not knowing how many of them had been sold by Kester. The plaintiff came down from Clyde to New York, about a week after the sale of the hats. At his request, I gave Mr. Kester notice of the transfer, on the 17th of April, 1846. This notice was in writing, and a true copy of it is now shown me.

Witness still owes the plaintiff; the amount depends upon how much balance would be due on the Philadelphia hats, after paying Kester's claim. In May, after the hats were attached in Philadelphia, I called on Kester and told him I was prepared to pay what was due on the hats. He refused

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to deliver them because of the attachment. My estimate of \$600 being due on the hats, went on the idea of the hats fetching what they were invoiced at. I considered they were worth what they were invoiced at. At the time of this transfer, Theodore Clark acted for the plaintiff, who was at Clyde ; he was sent for and came down.

Being cross-examined, the witness said—The hats in Philadelphia were not included in the bill of sale produced here. We made no inventory of them, not knowing how many had been sold. Mr. Clark was to allow the invoice price of them. They were worth the invoice price. No provision was made for any that might be sold by Kester below the invoice price. I had no regular invoice of the hats. They were left at different times. I had memorandums of them. Don't know that I had any written memorandums of the amount which Kester had advanced on them. He had advanced me his notes on them. I know the amounts of the notes. Clark took the hats at the invoice price. I did not know what particular sum they would amount to, after paying Kester. No particular sum was agreed on for the price, as it was not known what Kester had sold nor what he had on hand. There was neither a bill of sale, nor a receipt, given for the Philadelphia hats ; no paper was given on the transfer of the Philadelphia hats prior to the letter of 17th April ; no bill of sale ; no receipt for the price ; no papers were made. On the 17th April, I wrote the notice in Kester's office, and delivered it there to Kester. At the time the letter was written, no particular amount was fixed upon to be allowed for the Philadelphia hats. Nothing was agreed as to the price, in case any hats had been sold. No provision was made about the price of the hats, in the event of sales made below the invoice price by Kester, as to Clark's bearing the loss. There was no paper made afterwards in relation to the hats in Philadelphia.

Direct examination resumed.—(It is now agreed that the defendants in this suit arrested the witness on a Stillwell warrant, on the 7th May, 1846, and that he was examined on the 8th and 9th of May, 1846, before Judge Oakley.)

In the course of May, 1846, I went again to Philadelphia, at

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the request of Mr. Clark, to pay off Mr. Kester, and sell the hats. The time I went to Philadelphia for this purpose, was after my examination here on a Stillwell warrant. Mr. Kester refused to deliver the hats until the attachment suit was settled.

Cross-examination resumed.—I had no money from the plaintiff to redeem these hats from Kester, but I had his signature to a blank paper, with authority from him to raise the money and pay Kester, and sell the hats to my customers in Philadelphia ; if I could not negotiate his paper, I was to return and he would raise it otherwise ; and in case I could not sell the hats, to bring them to New York and let him have them. Some of the Philadelphia hats were sold by Kester below the invoice price. I failed the last of March or first of April, 1846. I owed the defendants \$590, and upwards. The whole of my indebtedness at that time was about \$5000 or \$6000. I think not a fifth of it has been paid. I have paid defendants nothing.

Direct examination resumed.—I was to sell the hats for the plaintiff. He wished me to go on and sell the Philadelphia hats if I could, and if I could not sell them, to redeem them and bring them to New York.

The defendants then further cross-examined the witness, to show that there had been no change in the possession of the goods sold in the Third Avenue ; but the point was not discussed at bar, and the testimony is omitted.

Theodore Clark, called for the plaintiff, testified that he was the agent of the plaintiff, in 1846, when the sale of goods contained in the bill of sale, spoken of by Babcock, was made. At the same time that goods in the 3d Avenue were sold, Babcock sold to my brother his remaining interest in the hats in the hands of J. W. Kester, in Philadelphia. No bill of sale was made, but it was a bona fide sale. I don't recollect whether an order was given by Babcock. I don't remember that there was any transfer in writing, or any receipt endorsed. I wrote to Kester, I think, on the 3d of April. I have no copy of the letter.

The plaintiff then read the examination of John W. Kester, who testified as follows:—He resides in Philadelphia. There was an attachment served upon me for goods in my possession

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belonging to N. H. Babcock, I know it by the sheriff's officer serving and leaving a summons with me at my store in Philadelphia, on the 9th May, 1846. Witness now produces a copy of the summons served on him, in a suit by the now defendants against Babcock. There has been no other paper than this served upon me at the suit of the defendants, except some interrogatories in that suit.

No other attachment has been served upon me at their suit; nor were any goods taken out of my possession under their attachment.

Being cross-examined he said—When the sheriff or his deputy called, I stated of course that there had been goods in my hands belonging to Babcock, but that he had left a transfer of them to another party, Mr. Clark, of Clyde, and that I should hold them, or the proceeds whatever there might be left after paying myself, till I knew to whom I should pay the balance. I was to know this through the proceedings in court under this attachment. I understood this summons to attach the goods, or any balance that might remain in my hands, after paying my claim, that had belonged to Babcock, or that were placed in my hands by him.

I told the sheriff that I would hold the goods after my own claim was satisfied, subject to the attachment, and I have since so held them and the proceeds.

The attachment suit of Tucker and Lord v. Babcock, is still pending in Philadelphia, and it bars my paying the money over to Sylvester Clark. The sheriff did not take an account of the goods or their proceeds.

The witness produced an account of sales and proceeds, to June 12, 1847, which he said was correct. The balance, after paying himself, was \$86 52, and he had 120 hats then unsold.

Clark demanded these goods or the proceeds through his brother, by letter, and Babcock, as the agent of Clark, called and offered to pay off my claim and take the balance of the goods or proceeds; but I declined to deliver the goods on account of the pendency of this attachment suit. I still hold the property subject to that suit, and shall, unless the sheriff releases me

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from the attachment; but I should not deliver it to him without consulting counsel.

The letter written by Babcock in the witnesses store, was as follows:

“ *New York, April 17, 1846.*

“ Mr. J. W. KESTER,

“ Sir—All the hats which I left with you as collateral security for the payment of the amounts you have advanced me, I wish you to hold subject to Mr. Sylvester Clark’s (of Clyde) order, as I have sold all of them to him, and he is to pay the amount now due on them to you.

“ Yours respectfully,

“ N. H. BABCOCK.”

The witness said this letter was never delivered to Clark. He was not there. I think I had no correspondence with Theodore Clark, until after the attachment.

The witness identifies two letters written by himself to N. H. Babcock, one dated February 4, 1847, and the other dated January 31, 1847. These letters were read; they contained invoices of the hats Kester had received from Babcock, in 1846, taken from Kester’s books.

The plaintiff also read an exemplification of a foreign attachment, and the subsequent proceedings thereon, in the county court of the city and county of Philadelphia, in favor of the now defendants against N. H. Babcock.

The writ was issued May 9, 1846, and was entered as being issued on bail given. It directed Kester and one McCalla, to be summoned as garnishees. The sheriff’s return stated that he had attached as within commanded, by giving an attested copy to Kester, &c., and summoned them as garnishees. Tucker and Lord obtained judgment against Babcock by default, and a *scire facias* against Kester as garnishee, was issued and pending, on which he had been examined on interrogatories.

The plaintiff called J. N. Cordozo, who testified that he had been a counsellor at law in Pennsylvania, and was familiar with the law of foreign attachment in that state. It is entirely statutory. He proved the statute from Dunlap’s Laws, and



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said, the supreme court of that state have decided, that by service of such a copy of the summons as is contained in the exemplification, the goods of the defendant in the hands of the garnishee, are deemed as actually taken and seised, without being actually taken by the sheriff.

The plaintiff also offered to read two letters from Theodore Clark to Kester, one 22d May, and one 24th December, 1847, to which the defendants objected as being written after the attachment in question, and the same were excluded by the judge.

Hereupon the plaintiff rested, and the defendants' counsel moved for a non-suit on the grounds; 1st. That the plaintiff had not in law shown title to the goods sued for, there being no evidence of any memorandum in writing containing the terms of sale, or of any payment of price either in money or by any agreed credit, or of any delivery of the goods to the plaintiff by Babcock; and that in connection with the insolvency of Babcock at the time of the pretended transfer, the same was null and void.

2d. That the plaintiff had shown no such taking by the defendants, as subjected them to an action of trespass.

3d. That the plaintiff not being entitled to the possession of the hats in Philadelphia, at the time of the attachment, he could not, under the evidence given, sustain an action of either trespass or trover.

The judge ordered a non-suit to be entered, which the plaintiff now moves to set aside.

*R. H. Waller*, for the plaintiff, cited *Tuxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 *ibid.* 1; 2 Kent's Comm. 502; 7 T. R. 278; 1 Esp. R. 598; 3 B. & C. 423. As to the taking by defendants, *Wintringham v. La Foy*, 7 Cow. 735; *Phillips v. Hall*, 8 Wend. 610; *Root v. Chandler*, 10 *ibid.* 110; and as to his own possession, *Thorp v. Burling*, 11 John. 285; *Buck v. Aiken*, 1 Wend. 466.

*D. Lord*, for the defendants.

BY THE COURT. SANDFORD, J.—The subject of the sale

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relied upon by the plaintiff, was a quantity of hats in the possession of Kester in Philadelphia, and held by him for sale and for the repayment of his advances. The contract of sale was made in New York, and its validity depends upon our laws.

There was no note or memorandum of the contract made in writing. The letter delivered by Babcock to Kester, two weeks afterwards, aside from other objections to its effect, did not contain, or profess to contain, a statement of the contract of sale. The entire omission of all written evidence of the alleged sale, when so much form was used on the same occasion in respect of the goods in Babcock's store, is quite unaccountable; and on another point of the case, would present a serious barrier to a recovery.

No part of the purchase money was paid by the buyer. It is true that the price was to be paid by crediting it on the indebtedness of Babcock. Such was the agreement, but no act was done to carry it out. It was no payment until the application was made. In the other cotemporary sale, the contract was consummated by actually indorsing the price on one of the notes. In this instance no indorsement was made or receipt given. It went no further than the mere contract to pay in that mode; and so far as the statute is concerned, it no more aids to prove the contract valid, than does the agreement to pay the price, in an ordinary sale, where actual payment is expected.

There is but one other circumstance left, which could relieve this contract from the operation of the statute of frauds. Did the buyer accept and receive a part of the goods sold, or the evidences, or some of them, of Babcock's claim for the surplus after paying Kester? It is not claimed that the plaintiff ever actually received any of the goods, or any such evidences of Babcock's right; but it is contended that there was a sufficient constructive delivery to the plaintiff.

The letter of Theodore Clark, (the plaintiff's agent in the affair,) to Kester, on the day of the sale, is relied upon. But that is wholly insufficient. It was merely a belief of his that he wrote such a letter, while Kester's testimony is very decided that he did not. It does not appear what the supposed letter con-

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tained, or that it stated anything respecting the sale. And finally, if it were written and were ever so explicit on that point, it would not support the sale, because the seller did not join in it. An act of delivery, must of necessity, proceed from the seller. The buyer can only accept it and receive the property.

The letter of Babcock to Kester, written in Philadelphia, two weeks after the bargain was made, is the only ground remaining, to sustain a constructive delivery. As to this, it came too late. In order to make such an act a constructive delivery, it should be concurrent with the bargain. Not perhaps at the same moment of time, but substantially at the same time and as a part of the same transaction. This agreement is claimed to have been made on the 3d of April, and to have been valid when made. An act of delivery on the 17th of April, is too far removed to give force to a bargain, otherwise invalid, on the third.

Independent of this objection, there is a further difficulty which cannot be obviated. The buyer was not present or represented in the alleged delivery. The buyer must accept and receive the property, or the attempted delivery is unavailing. It may be said Babcock was the agent of the plaintiff at that time; but if he were, he could not in this delivery act in his own behalf as seller, and at the same time act as the buyer's agent to accept and receive the property sold. It will hardly be contended, that he could sell his goods to the plaintiff, by an agreement made by himself as seller, with himself as the plaintiff's agent. Yet the delivery and acceptance by the letter of April 17th, is equally objectionable. Kester cannot in any sense, be deemed the agent of the plaintiff, to accept and receive the property sold. The authorities cited by the plaintiff, do not sustain his positions, and one of them, *Carter v. Willard*, 19 Pick. 1, decides that if there had been a bill of parcels made and delivered by Babcock to the plaintiff on the 3d of April, the sale would not have been valid, without giving notice to Kester.

The cases in our courts are numerous, but it is needless to cite them at large. The last in point of time, *Schindler v.*

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De Wolf v. Murray.

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*Houston*, (1 Comstock's R. 261,) is in our highest court, and is conclusive against the plaintiff.

We are perfectly clear, that the alleged sale of the property in question was void by the statute of frauds. The case proves the wisdom of the statute. Babcock had no invoices of the property and scarcely the materials for making one. He had no account of the sales made by Kester, either as to the articles sold or the price. No price was fixed between him and the plaintiff; none could be fixed, upon the information they possessed. It was all indefinite and uncertain, and left open upon parol evidence, to be moulded or applied, as subsequent emergencies, or the fallible recollection of the parties, might direct.

Our conclusion on the first question presented, relieves us from passing upon the other points made at the trial, neither of which appears to be free from difficulty.

Motion to set aside non-suit denied.

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DE WOLF v. MURRAY.

Where a notary certifies that he attended at the office or place to which a bill of exchange was addressed, for the purpose of demanding payment, and found the office closed, and no person there to give an answer respecting the bill; (it not appearing to have been a bank or banker's office;) it was *held* to be a sufficient presentment of the bill to charge the indorser.

The certificate imports a presentment during the proper hours of business.

A statement, made up by the indorsee, charging the indorser in terms with the "protested exchange," describing it by the drawer's name, the acceptor's name, and the amount, and adding to it expenses of protest, interest and damages, was submitted to the jury as sufficient notice of the dishonor of the bill, if the indorser were thereby distinctly informed that it had been dishonored, and that payment was expected of him as indorser.

Where notice of dishonor is given too late, the indorser will be bound by a subsequent promise to pay the bill, if made with a knowledge that the notice was not in time.

Sept. 27; Oct. 28, 1848.

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De Wolf v. Murray.

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ASSUMPSIT against the indorser of a bill of exchange for £230, dated at New York, August 14, 1847, drawn by W. Russell to the order of the defendant, and payable sixty days after sight. It was addressed to H. O. Collard, as mentioned in the opinion, and was accepted by him on the 28th of August, 1847.

The protest of the bill, signed and sealed by the notary, was read in evidence, in these words, viz. :

“On this 30th day of October, 1847, I, Arthur Ellis, Notary Public, duly admitted and sworn, dwelling in Liverpool, in the county of Lancaster, kingdom of Great Britain, at the request of the holders thereof, did attend to exhibit the original bill of exchange, (whereof a true copy is on the other side,) at the office of H. O. Collard, No. 13 Chapel Walks, Liverpool, the person upon whom the said bill is drawn, for the purpose of demanding payment thereof, (the time limited for payment thereof having expired,) when I found the said office closed, and no person there to give an answer respecting the said bill. Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest, against the drawer and indorsers of the said bill, and all others concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of payment of the said bill.”

The plaintiff called a witness, who testified that the plaintiff received the protested bill in New York, on the 22d of November, and on the same day presented to the defendant a statement in these words, viz. :

“*Christopher Murray, Esq.*, 111 Broad Street,

“To THOS. L. DE WOLF, Dr.

“Nov. 22.—For W. Russell’s protested exchange on

H. O. Collard, Liverpool, G. B., for £230 ster-

ling, due 30th October, and expenses of protest

23s. 4d. sterling, at \$4 84 per £1 sterling,

\$1118 04

Interest from 30th October to date, 22 days, at 7

per cent.,

5 10

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\$1123 14

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 De Wolf v. Murray.
 

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<i>Amount brought forward,</i>	\$1123 14
Damages, 10 per cent.,	112 31

Cash,	\$1235 45
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“*New York*, Nov. 22, 1847.”

The defendant said he would call and see the plaintiff, and afterwards promised to pay the bill.

It was proved that the first arrival in New York of letters from Liverpool, written on or after October 30th, was on the 22d of November, 1847.

The plaintiff here rested his cause, and the defendant moved for a non-suit, on the following grounds :

*First.* Because no notice of protest sufficient to charge the defendant as indorser, was proved to have been delivered to him. The paper delivered does not apprise him of the due presentment and demand of payment of the bill, nor that he is looked to as the indorser for payment.

*Secondly.* That no proof has been given of notice of protest being sent from Liverpool at all ; or if sent, that there was no proof when it was sent from England, or that notice of protest was sent by the first vessel sailing after the bill was protested, or when it arrived at New York, or that notice was given within due time after the arrival of information of the protest received in New York.

*Thirdly.* That there is no sufficient evidence of a demand on the acceptor to charge the defendant as the indorser. That the facts stated in the protest, are not sufficient for that purpose.

*Fourthly.* That the notice of protest should have been given by the notary who protested the bill of exchange, and should have been accompanied by a copy of the original protest, or that notice of the protest should have been given here by a notary public, accompanied with a copy of the original protest, it being a foreign bill.

The court overruled the motion.

The defendant then called a witness, who testified that it was on the 24th of November, and not on the 22d, that the statement was delivered by the plaintiff to the defendant.

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De Wolf v. Murray.

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The judge charged the jury as follows :

*First.* That the proof of demand of payment of the bill and of its dishonor, was sufficient. *Second.* That the notice of dishonor of the bill, if given on the 22d of November, was in time and sufficient, if the defendant was distinctly informed that the bill had been dishonored, and that payment was expected of him as indorser. *Third.* If notice was given on the 24th day of November, it was not in time ; and in that case, the plaintiff could not recover, unless the jury should find that the defendant promised to pay the bill with a knowledge that the notice was not in time.

The defendant excepted ; and the jury found a verdict for the plaintiff.

*E. Sandford*, for the defendant.

*J. Larocque*, for the plaintiff.

BY THE COURT. VANDERPOEL, J.—It is contended in behalf of the defendant, that no sufficient evidence was given of a demand of payment from the acceptor of the bill in England, to render the defendant liable as indorser. The statute gives the notary's certificate as a substitute for his personal testimony at the trial. (2 R. S. 212, § 46, 2d ed.)

The bill was directed to H. O. Collard, No. 18 Chapel Walks, Liverpool. The notary says in his certificate, that on the 30th day of October, 1847, he did, at the request of the holders, *attend to exhibit* the bill of exchange, at the office of H. O. Collard, at No. 18 Chapel Walks, Liverpool, for the purpose of demanding payment thereof, (stating in parenthesis, that the time limited for the payment thereof had expired ;) when he found the office door closed, and no person there to give an answer respecting the said bill. The demand was made at the place which the bill itself indicated as the drawee's residence or place of business. It was directed to him at the place where the demand was made, and although the certificate of the notary does not state the time of day when demand of payment

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was made, yet it is not, as against this official act, to be presumed to have been made at an unseasonable hour.

In *The Cayuga Co. Bank v. Hunt*, (2 Hill, 635,) the notarial certificate of a protest of a bill of exchange, stated a presentment for payment at the office of the acceptor on the proper day, and that the office was closed, but was silent with respect to the *hour* of doing the act; yet it was held sufficient, as regularity in this particular should be presumed. We say here, as Justice Cowen said in that case, the certificate in fair construction, imports a presentment of the bill during the proper hours of business. These, except where the paper is due from a bank, generally range through the whole day, and in the evening till bed time. (*Cayuga Co. Bank v. Hunt*, 2 Hill, 635; *Wilkins v. Jadis*, 2 Barn. & Adol. 188.) In the latter case, it was held, that presentment of a bill of exchange for payment at a house in London, at eight o'clock in the evening of the day when it becomes due, is sufficient to charge the drawer; although at that time, the house was shut up, and there was no person there to pay the bill. Lord Tenterden says, that as to bankers, it is established with reference to a well known rule of trade, that a presentment out of the hours of business is not sufficient; but that in other cases the rule was, that it must be presented at a reasonable hour, and that eight o'clock in the evening was not an unreasonable hour. We hold the certificate here to be sufficient evidence of a presentment of the bill for the purpose of demanding payment.

2. It is contended, that no notice of protest sufficient to charge the defendant as indorser, was given. The judge charged the jury, that notice of the dishonor of the bill, if given on the 22d of November, was sufficient and in time, but that if given on the 24th of November, it was not sufficient; and in that case, the plaintiff could not recover, unless the jury found that the defendant had promised to pay the bill with a knowledge that the notice was not in time. The jury found for the plaintiff. The defendant positively promised to pay the bill, not once, but twice. He seemed to be informed of its return, before the agent of the plaintiff disclosed the fact to him; for as soon as the witness opened the door, the defendant said, "Well,



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that thing has come back." The bill of parcels was handed to him, and two or three days afterwards, upon being applied to for the amount, he promised to pay it. Afterwards he called at the plaintiff's office, and again promised to pay it. The bill of parcels sufficiently informed him of the ground on which the demand was made, and we cannot under the evidence in the case, hold that he was not fully cognizant of every fact necessary to render his unqualified promises to pay binding. Without intending to imply that any pre-requisite, necessary to render the defendant liable as indorser, has not been complied with, we would, if there had been any non-compliance with such pre-requisites, find it difficult to hold that the defendant made his promises to pay in ignorance of such omissions. After carefully looking at the evidence in this case, and the verdict of the jury, we deny the motion for a new trial.

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CARROLL v. UPTON.(a)

Where the notary, to whom a bill is intrusted for presentment, on protesting the bill, makes diligent inquiry to ascertain the residence of the drawer, and sends notice to him according to the information thereby obtained, it will be sufficient to charge the drawer, although it appear that he did not reside at the place to which the notice was sent, and in fact resided in the place where the bill was protested.

Thus, where a bill was drawn at Washington, on a house in New Orleans, and the notary, (as he testified,) on its acceptance being refused in N. O., made diligent inquiry as to the drawer's residence, learned that his reputed residence was at W., and to the best of the notary's knowledge and belief, such was his residence, and thereupon notice was sent to the drawer at W.; it was *held*, that sufficient diligence had been used to charge the drawer; although the testimony on his part proved that he was, and long had been, a resident of N. O., and a counsellor at law there, and was temporarily at W. when the bill was drawn; and it was also proved, that the same notary had known him several years, and

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(a) The Chief Justice did not sit in this case. See the next case, *Rawdon v. Redfield*.

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three months before, had entered of record an official act as notary, in which the drawer was described as residing in N. O.

The law of the place where a bill is drawn, governs as to the mode and place of the notice of non-acceptance and of non-payment to be given to charge the drawer ; and a different usage prevailing at the place where the drawee resides or the bill is presentable, will not be admitted to control the drawer's liability.

Sept. 29 ; Nov. 11, 1848.

THIS was an action of assumpsit, brought by the payee of a bill of exchange, against the drawer. The bill was as follows :

“\$295 32.                      “ *Washington City, March 10th, 1845.*

“ At three days sight, please pay to the order of Mr. Thos. Carroll, the sum of two hundred and ninety-five dollars and thirty-two cents, and charge the same as advised to Clayton Tiffin.

And oblige your ob't. serv't.,

“ FRANCIS H. UPTON.

“ *To I. W. Arthur & Co., Merchants, New Orleans.*”

The defendant having with his plea, denied the receipt of notice of non-acceptance or of non-payment of the bill, the plaintiff, at the trial, read the deposition of Greenbury R. Stringer, the notary in New Orleans who protested the bill, and gave the notices. The witness testified, that he is a notary public, residing in New Orleans ; that he knows plaintiff by name only, and has known defendant for six or seven years past. That he presented the bill in question to I. W. Arthur & Co., for acceptance, March 20, 1845, and for payment on the 26th of the same month ; on each of which occasions, said I. W. Arthur & Co., did decline and refuse to accept and pay said draft, for the reason, they said, they had had no funds of the drawer. That he has been a notary ever since about March, 1843, and is so still. That on the 26th of March, 1845, as such notary, he protested the bill. That at the time of such protest, the defendant resided at Washington, in the District of Columbia, to the best of witness's knowledge and belief ; and that was the defendant's reputed place of residence, and witness believes he was there at that time. That as such notary, he did send, by mailing at New Orleans, a notice of non-acceptance of the bill, to Upton, directed to him at Washington City, in the District of

Columbia, on the 20th of March, 1845, in time to go by the first mail after the protest for non-acceptance. (A sworn copy of the notice was annexed to the deposition.) And that at the time of that protest, he did make diligent inquiry as to where the drawer then resided, and as to where he was at that time, and as to where a letter would reach him. And that it is the custom, practice and law, of the state of Louisiana, to send notice of protest to the drawer or maker of a draft or bill at the place where the draft or bill is dated, when the drawer or maker is absent from his usual place of domicil or residence.

On his cross-examination, he testified that the notarial copy protest, and copy of the notices annexed to the commission and depositions, are all correct, and were made by witness. That in his notarial records on 25th day of December, 1844, he finds an act of procuration passed before him as a notary public, from Clayton Tiffin to Francis H. Upton, the defendant in this suit, appointing Upton the agent and attorney in fact of Tiffin, and by which Upton is declared to be thereby placed in custody, possession and control, of the plantations and slaves of Clayton Tiffin on the Mississippi River, in the state of Louisiana; and Upton is therein described as a counsellor at law, of the city of New Orleans. (A copy of the act of procuration was annexed.) He also finds in his records, an act passed before him as notary, by the defendant to I. W. Arthur, on the 7th of May, 1845, transferring defendant's interest in a certain mortgage; and he is therein described as a counsellor at law of New Orleans. (A copy of the transfer was annexed.)

In these notarial acts, the witness, in his capacity as notary public, described the defendant as a resident of New Orleans.

The plaintiff read the deposition of Isaac W. Arthur, one of the drawees of the bill, to prove that he was not in funds of the drawer; and claimed to prove by it, that the drawer did not, when it was drawn, believe the bill would be accepted or paid.

The defendant read the deposition of Wheelock S. Upton, by which it appeared that the defendant went from New Orleans to Washington, to attend the supreme court of the United States to argue a cause of Clayton Tiffin's, and that the bill in question was drawn for the fees of the plaintiff, as clerk of that

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court, in Tiffin's suit. And the witness stated, that the defendant was authorized to draw on Arthur & Co., for the funds requisite to defray the expenses of that suit.

Both of these witnesses testified, that the defendant was a resident of New Orleans, at the date and protesting of the bill, for some years prior, and for a considerable period afterwards; where he was a practising counsellor at law.

The judge at the trial, reserving the points of law, submitted to the jury the question as to the good faith with which the bill was drawn, upon which the jury found against the defendant. A verdict for the plaintiff was taken, subject to the opinion of the court.

*W. Rutherford*, for the plaintiff.

*E. W. Stoughton*, for the defendant.

BY THE COURT. SANDFORD, J.—The defendant as the drawer of this bill, was entitled to notice of its non-acceptance, unless some cause existed which made it unnecessary for the holder to give him such notice. The plaintiff claimed, that the drawer had no reason to expect that the bill would be accepted or paid, and therefore he was not entitled to notice. This question was submitted to the jury on the testimony; and it is contended by the defendant, that there was not sufficient testimony against him to warrant the judge in leaving it to the jury.

We have considered the point, and having regard to the circumstance that the burthen of proof was upon the plaintiff, we are satisfied that the evidence against his position was altogether too strong to warrant a finding in his favor. The verdict on the question is so clearly against evidence, that we must lay it aside in disposing of the case.

Independent of this ground, upon which the plaintiff sought to excuse the omission to give notice, he claims to recover on the sufficiency of the notice which was actually given. This notice was sufficient in form, and sent at the proper time; but it was sent to Washington City, and the defendant's residence was in New Orleans.

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We do not think the usage relied upon, can aid the plaintiff. The bill was drawn at Washington, as it disclosed on its face. Hence, the law of that place governs as to the mode and place of the notice to be given to the drawer. (Story on Bills, § 391, and the previous sections there referred to.)

It is said, however, that the notary used due diligence to discover the defendant's residence, and he sent the notice to the latter according to the best of his knowledge. The notary testifies, that at the time of the protest, he made diligent inquiry as to where the drawer then resided, and to the best of his knowledge and belief, the defendant then resided at Washington, and was there at the time; and that, the notary says, was his reputed place of residence. On the other hand, he says he has known the defendant six or seven years, and in December before this occurrence, entered a notarial act describing him as residing in New Orleans. The subsequent notarial act in May, has no bearing upon the question of his diligence in March. The defendant, for some years had been a counsellor at law in New Orleans, but had been absent over two months at Washington on professional business. ●

The point is undoubtedly, whether the notary made diligent inquiry; because if he did, his miscarriage is not to deprive the holder of the bill of his claim against the drawer. We do not consider the notarial act in December, 1845, as of much weight in the case. The frequency of those official duties in a large city where the laws are of French origin, must in general, preclude the recollection of individual instances. Our officers who certify the acknowledgment of conveyances, necessarily read the residence of the grantor in ascertaining the identity to which they certify. Yet it would be contrary to reason and experience, to presume that after the lapse of two months, they would recollect the description of such residence, in any given instance.

The fact of the defendant's residence in New Orleans, and his professional standing, are met by his actual absence at the time, and by the notary's inquiry and its results. It is not proved that the defendant's name was in the directory, or that he had an office or place of business, or any other fact, which

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is inconsistent with the testimony of the notary, as to his knowledge and belief respecting the defendant's residence, after diligent inquiry.

After a full consideration of the subject, we have no doubt that the proof shows reasonable diligence in the notary, to make the notice effectual.

The established principle is, that if the notary inquire of persons likely to know the residence, and having no interest to state it erroneously, and acts on the information thus acquired; it suffices, although it be wrong. A reference to a few of the decisions in this state, will illustrate the law as now established.

In *Chapman v. Lipscomb*, (1 Johns. R. 294,) a bill was drawn and dated in New York, on a firm residing there, by the defendants, residing in Petersburg, Virginia. On payment being refused, the clerk of the notary made diligent inquiry after the defendants, at the banks in New York and elsewhere, and the information was, that they resided at Norfolk, and he sent notices addressed to them at that place. It was held, that due diligence had been used and that the notice was sufficient.

In *Reid v. Payne*, (16 Johns. 218,) the notary, after demanding payment of a note, on inquiry as to the residence of the indorser, was informed that he lived in Greenbush, and notice was sent to him at that place. In fact, he lived in an adjoining town, five miles distant from the post-office in G. It was held, that sufficient diligence was proved.

In the *Bank of Utica v. Davidson*, (5 Wend. 587,) the note protested was dated at South Bainbridge. When it was presented for discount, by the agent of the maker, he informed a clerk in the bank that the indorser resided in Bainbridge, of which the clerk made a memorandum. The notice of protest was sent by mail, directed to the indorser at Bainbridge. The indorser resided in Masonville, twelve or fourteen miles distant. He had resided in Bainbridge until a short time before the note was made. The court held, that due diligence was shown, and that the notice was sufficient.

The *Bank of Utica v. Bender*, (21 Wend. 643,) was like the case last cited, except that the information was given by the

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drawer of the bill for whose benefit it was discounted, and the indorser had never resided at the place to which notice was sent. The notice was adjudged to be sufficient, and the decision was affirmed in June, 1841, by the court for the correction of errors.

In *Ransom v. Mack*, (2 Hill, 587,) the notary being ignorant of the residence of the defendant, the first indorser, applied for information to the second indorser, and was told to send the notice for the former to North Adams. The defendant did not reside at that place, or in the town, but received his letters at another post-office in the town of Adams. The court held, that the notary was well warranted in acting on the information thus obtained, and that there was due diligence.

Many other cases are referred to in Story on Bills, § 351, note 4, and the law appears to be uniform in almost every state in the Union. The cases of *Preston v. Daysson*, (7 Louis. R. 7, by Curry,) and *Vigers v. Carlon*, (14 *ibid.* 89,) show that the rule prevails in Louisiana. On the authority of the latter, which in its circumstances is quite similar to the one before us, the diligence proved here would be held sufficient in that state. The rule of law thus established is founded in good sense, and a due regard to the rights of all parties, and applied to the testimony before us, entitles the plaintiff to recover.

Judgment for the plaintiff.(a)

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(a) Affirmed in the Court of Appeals, April 17th, 1850.

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Rawdon v. Redfield.

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**RAWDON v. REDFIELD.(a)**

A notary charged with giving notice to an indorser of the non-payment of a bill of exchange, must make reasonable efforts to ascertain his residence if it do not appear on the face of the bill ; and it is sufficient if he give the notice in good faith according to the information thus obtained.

If he inquire of persons who are likely to know his residence from their connection with the transaction, and are not interested to mislead ; it will be a reasonable degree of diligence.

So where the indorser of a bill, residing at its date in Troy, before its maturity removed to and commenced business in New York, but his name was not in the directory, and a notary protesting the bill in New York, inquired of the acceptor and holder, and being informed by them that the indorser lived in Troy, sent a notice to him by mail at that place, it was held sufficient to charge the indorser.

March 21 ; March 31, 1849.

CASE subject to the opinion of the court. The cause was by consent argued before the Chief Justice alone, in whose opinion the facts are sufficiently stated.

*A. W. Clason, Jr.*, for the plaintiff.

*P. T. Woodbury*, for the defendant.

BY THE COURT. OAKLEY, CH. J.—This is an action on a bill of exchange, drawn by a party in the city of Troy on a firm in this city, payable to and indorsed by the defendant, then residing at Troy, and which was subsequently indorsed to the plaintiff. The bill was accepted, and at its maturity was not paid. Issue was taken on the presentment of the bill for payment, and on the service of notice of protest and non-payment on the defendant.

There is no question as to the presentment of the bill for payment. The difficulty, if any, arises on the proof of the service of the notice of protest ; it being claimed that it was

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(a) See the preceding case.



not served at or sent to the place of the defendant's residence. It appears that he is a single man, and for several years up to the first of May, 1847, was in business at Troy. He then closed his business at Troy, and concluded to remove to this city, and about the first of July entered into copartnership for the transaction of business here, notice of which was published in one or more of the city papers, on the 15th day of July. The defendant's name had not, however, appeared in the firm at its place of business, when the bill of exchange matured; and it was not to be found in the city directory.

The notary on protesting the bill, looked into the directory, and not finding the defendant's name there, inquired of the acceptor and the holder of the bill as to the residence of the defendant. Both of them informed the notary that he lived at Troy, and the notary sent a notice of protest by mail, addressed to him at that place.

The question is whether due diligence was used by the notary, and whether the notice of protest was sufficient. The leading cases to which I was referred, were *Ransom v. Mack*, 2 Hill, 587; and *Spencer v. The Bank of Salina*, 3 *ibid.* 520, with several others there cited.

The principle to be extracted from the authorities is, that if the notary inquire of persons who, from their connection with the transaction, are likely to know the residence of the indorser, and are not interested to mislead the notary, and he acts on the information thus obtained, it is due diligence on his part. That was done here, there was no interest to mislead either in the acceptor or the holder. The notary must make reasonable efforts to ascertain the residence of the parties entitled to notice, when it does not appear on the face of the instrument. If that be done in good faith, and he act accordingly in giving the notice, it is enough, and the party will be charged.

Judgment for plaintiff.

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Aspinwall v. Meyer.

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**ASPINWALL and others v. MEYER. (a)**

A promissory note, given to a mutual insurance company as a subscription or premium note, in advance, for the security of dealers, as provided by its charter, is to be regarded as a valid promissory note, liable to be used to pay the losses of the company.

Such a note may be transferred by the president of the company alone, in payment of a loss, in the usual way and according to the common practice of the company, without his being authorized to do so by a previous resolution of the board of trustees.

It was the design of the statute "to prevent the insolvency of monied corporations" to guard against *collusive* transfers of the effects of such corporations. It was not meant to interfere with honest transfers, made in order to pay their just debts.

A person taking from the officers of an insurance company, the note of a third person, in payment of a loss sustained by him, will be held to be a bona fide purchaser thereof for a valuable consideration and without notice, under the provision of the revised statutes prohibiting certain transfers of corporate effects except upon a previous resolution of the board of directors.

And the maker of such note, in a suit brought thereon by the holder, cannot be permitted to allege that the plaintiff did not pay value for it, or that the trustees of the company did not authorize its officers to transfer the same; unless he can show that he was defrauded, or lost some defence he might have had against the payees, had they retained it.

It is not enough for the maker of a note, when sued thereon, to say that it was transferred to the plaintiff without a valuable consideration; but, to defeat a recovery upon it, he must show that it was transferred in fraud, or to the prejudice of his rights. *Per VANDERPOEL, J.*

It is no defence to an action on a promissory note, that the *property* of the note is in a third person, and not in the plaintiff. Unless the possession of the note by the plaintiff is *mala fide*, and may work some prejudice to the defendant, the latter is not entitled to be heard on the subject. *Per VANDERPOEL, J.*

Sept. 29; Nov. 11, 1848.

THIS was an action of assumpsit, brought to recover the amount of a promissory note for \$3698 40, dated May 1st, 1846, payable twelve months after date, made by the defendant to the order of The Alliance Mutual Insurance Company, and alleged to have been indorsed by the company to Howland & Aspinwall, the plaintiffs. The cause was tried before Judge SANDFORD, without a jury, on the 6th day of June, 1848, and

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(a) OAKLEY, Ch. J. absent by reason of ill health.

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by consent of the respective parties, a verdict was taken for the plaintiffs for the sum of \$3973 81, subject to the opinion of the court. The defendants counsel admitted the signature of defendant and the endorsement of the company by James D. P. Ogden, as president of The Alliance Mutual Insurance Company, and the fact of his being president at the time of such endorsement; and also that the firm of Howland & Aspinwall was composed of William H. Aspinwall, William A. Howland, and John L. Aspinwall, the plaintiffs. The plaintiffs then rested.

The act incorporating The Alliance Mutual Insurance Company, passed April 10th, 1843, and the act incorporating The Atlantic Mutual Insurance Company of the city of New York, passed April 11th, 1842, were read in evidence by the defendant.

The defendant proved by LEWIS BENTON, formerly secretary of the company, that the note in question was originally a note for \$5000, dated May 1, 1845; that it was not one of the original subscription notes of the company, but was given to be taken out in premiums; that on the 1st of May, 1846, there had been charged against the note \$671 74, for insurances, whereupon the defendant gave a note for these premiums, \$671 74. He then gave, for the balance, a new note for \$4398 40, and the \$5000 note was given up to him. That on the 30th of Nov. 1846, a new note was given, dated back, May 1, 1846, the note in controversy for \$3698 40, and another note for \$700, in lieu of the note of \$4398 40.

JAMES D. P. OGDEN testified that he was the president of The Alliance Mutual Insurance Company in 1847; that it was the duty of the president and the secretary to adjust losses and to pay them; that he settled with the plaintiff in respect to the policy upon the Mary Ann; that in case a vessel insured was not heard from, it was the custom of the company to take a year to pay the loss; that the Mary Ann was not heard from for six months, but a vessel arrived at New Orleans, reported to have passed a week, on which the name of the Mary Ann was seen, after which the company could not claim a year's credit; that the witness then gave to the plaintiffs the note in suit, in

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payment of the loss, and turned out other notes as collateral security ; that he hoped the note would come back to the company, and that they could pay the loss in cash ; that he considered the company solvent at the time the note was transferred ; and that he considered the claim a valid one, it being a total loss. The other facts established on the trial, sufficiently appear from the opinion of the court.

*J. Brice Smith*, and *D. Lord*, for the plaintiffs.

I. The note was given under the charter, as the real capital of the company, in renewal of one for \$5000. This was one of \$150,000 subscribed for by the defendant with others as additional capital, and the notes delivered to the company. It was not without consideration in the hands of the company. If it remained in the company's hands after its failure, the company could sue for it, to pay creditors.

II. The note was passed to the plaintiffs before due, by the authorized agent of the company, for valuable consideration. The policy was cancelled, and the note was applied by the company for one of the purposes for which the company was created, and without notice. Aspinwall resigned on the 19th of December, 1846. No equities or offsets between the company and the defendant could affect the plaintiffs.

III. The company was not insolvent in May, 1846, or February, 1847. Nor was the note passed by way of preference, or in contemplation of insolvency.

IV. The transfer to the plaintiffs by the company, was not void. The plaintiffs were *bona fide* purchasers for a valuable consideration. No notice is charged or proved against them of any want of a previous vote of the board. They dealt with the authorized officer of the company in the usual mode, without notice. Again, the defendant cannot set up this defence. The act does not make the transfer void. If the note is a valid note in the hands of the company, he must pay it. He has received no notice from the company not to pay. If the transfer is void, the plaintiffs are trustees of the company, and will hold the fund for their benefit. The suit can be brought in the name of any person.

*W. Kent*, for the defendant.

I. The transfer of the note in suit, being for the payment of \$3698 40 to the plaintiffs, on the 19th of February, 1847, not authorized by a previous resolution of its board of directors, was illegal and void, and passed no right or title therein or thereto, to the plaintiffs. It was made by the president alone, without the concurrence of any other officer of the company. The by-law does not authorize this transfer. But the by-law must conform to the statute, (2 R. S. 599,) or it is void.

II. The plaintiffs having taken the note in question as collateral security for a pre-existing debt, without surrendering any valuable consideration, and Wm. H. Aspinwall having been one of the directors of the Alliance Company when the note was taken, and for a long time subsequent, they, the plaintiffs, are not *bona fide* purchasers without notice, and took the note subject to all existing equities.

Nothing was surrendered by the plaintiffs; no receipt given. (*Stalker v. McDonald*, 6 Hill, 93.)

III. The transfer of the note to the plaintiffs was fraudulent and void.

(1.) At common law the transfer of a note to a person who had just ceased to be a director, by a company then about to fail, would be fraudulent; or the question whether fraudulent or not, should be decided as a question of fact. (1 R. S. 592, § 12.)

(2.) The transfer is void under the revised statutes. (1 R. S. 591 and 601, § 64.) Or at least, the question should be distinctly decided. The testimony shows the company was then insolvent.

(3.) This presumption is made positive by § 14 of 1 R. S. p. 591 and 592. And see sections 12, 13, 14, 15, 16, 17, pages 594, 595.

That the defendant may take advantage of the illegality of the transfer, see *Gage v. Kendall*, (15 Wend. 640.) He shows the plaintiff's possession is *mala fides*. (*Olcott v. Rathbone*, 5 Wend. 494.) A judgment against us here, would be no defence in a suit against us by the receiver on this note.

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*D. Lord*, in reply.

I. Does the statute relied upon, apply to this kind of corporations? Banking associations are clearly within the letter of the statute; yet it has been held, because these bodies have no boards of directors, that they are not within its provisions. (*Gillett v. Campbell*, 1 Denio, 520.) So here, these corporations have no stockholders, as those mentioned in the Revised Statutes must have; and other circumstances show they do not apply. Here the creditors and the managers, or those in place of stockholders, are the same persons. The sections of the statute from 19 to 25, are excluded from application. But sections 14 to 18, and many others, are also totally inapplicable, because there are no stockholders, no surplus profits, and the like.

II. If the revised statutes be applicable, this act is not prohibited by the 8th section. The first clause provides only for absolute transfers. The proviso shows the protection is not limited to one who pays money or property on the faith of it. It means one who takes the transfer in ignorance that it is not authorized; being intended to prevent collusive transfers and dispositions. The conveyance in the hands of the purchaser, not the property, is to be affected. The *notice* refers only to misbehavior of the officers or directors. So here, we took this by an ordinary corporate transfer, regular on its face, for a valuable consideration, and in ignorance of any wrong or want of authority of the officers. A contrary rule would cripple all active business corporations.

III. This defendant cannot take advantage of it, if invalid. The statute does not make it void, but makes the directors liable. And if illegal, the transfer being executed, a third person cannot take advantage of the defect. (*Hall v. Gird*, 7 Hill, 586; *Guernsey v. Burns*, 25 Wend. 411.) The security of the plaintiffs was given up and cancelled. The policy was brought to the company, and their receiver produces it.

BY THE COURT. VANDERPOEL, J.—The note in suit was transferred to the plaintiffs on the 19th day of February, 1847, by Mr. Ogden, the president of the Alliance Mutual Insurance

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Company, under the following circumstances. On the 28th day of August, 1846, the plaintiffs took from the company a policy on the brig Mary Ann for \$9600; the voyage to be from Baltimore to Port Maria, Falmouth, and Jamaica, to either first. On the day of the transfer of this note, the vessel had not been heard from for six months; but a vessel arrived at New Orleans, reported to have passed a wreck, and the name "Mary Ann" was reported to have been seen on it. Mr. Ogden says, that he then gave to the plaintiffs for their loss, the note in suit, with other notes as collateral security. He says his hope was, that the note would come back to the company, and that they would be able to pay the loss in cash; but in May, 1847, the company failed, and all its assets were passed over to a receiver. Aspinwall, one of the plaintiffs, had been a trustee of the company, and resigned on the 19th day of December, 1846.

The first question is, for what purpose was the note given? We consider it as having been given as a subscription note, or a premium note in advance, under the twelfth section of the charter of that company. Under the decisions we have made in a number of cases, affirmed by the court of appeals, this note must be regarded as a note liable to be used to pay the losses of the company. We so informed the counsel on the argument, and under this intimation, the discussion of that point was waived.

It is contended, that the transfer of the note was made by the president alone; and was not authorized by a previous resolution of the board of directors; that it is therefore void, and passed no right or title therein to the plaintiffs. Without here considering the point, whether it lies in the mouth of the defendant to question the validity of the transfer, for the reasons assigned by him, we will inquire, whether the president had a right to make the transfer; and this involves the inquiry, whether this case comes within the provisions and prohibitions of the portions of the revised statutes relied upon by the defendant.

The revised statutes, (vol. 1, 591, § 8,) provide that "no conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such

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corporation of any of its real estate, or of any of its effects, exceeding the value of one thousand dollars ; but that this section shall not apply to the issuing of promissory notes or other evidence of debt, by the officers of the company, in the transaction of its ordinary business ; nor shall it be construed to render void any conveyance, assignment, or transfer in the hands of a purchaser for a valuable consideration, and without notice." This provision is found in the statute "to prevent the insolvency of monied corporations ;" and it may well be doubted whether it extends to mutual insurance companies of this description. (*Gillett v. Campbell*, 1 Denio, 520.)

At all events, we are quite clear, that this act of transfer does not come within the mischief against which it was the object of the statute to guard. The act or charter creating the company, provides that "all the corporate powers of the company shall be exercised by a board of trustees, and such clerks and agents and other persons, as said trustees may appoint from time to time." The trustees appointed a president, and by a by-law, which it was competent for them to make, they provided, that the president and vice-president should have authority to pay claims upon the company, in full, or by compromise. It is in evidence that this loss was paid by the president, in the usual way, and that it was common for him to pay losses with notes. There is nothing in the case, to warrant the suspicion, that the claim was not fair, or that there was any collusion between the president and the claimant, to whom the note was transferred. It is, to be sure, alleged, that Aspinwall had been a trustee, and hence, it is argued he must have known that the company was insolvent, when he took a transfer of notes, in payment of his claim. The contrary, however, satisfactorily appears. The transfer was made on the 19th of February, 1847. Aspinwall resigned as trustee on the 19th of December, 1846, and the company continued to take risks and do business till it failed, in May, 1847. We are not, on the evidence in the case, authorized to conclude that the company was in point of fact, insolvent when the note was transferred ; nor can we yield to the idea, that Aspinwall's previous connection with the company, as trustee, can in any manner invalidate the transaction.



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The whole scope of the statute "to prevent the insolvency of monied corporations," shows that its design, by the eighth section was, to prevent *collusive* transfers of the effects of such corporations. It surely could not have meant to interfere with honest transfers, made to pay their just debts. The ninth section, p. 591, clearly shows the penal effect which is to flow from the acts there prohibited. It provides, that "no conveyance, assignment, or transfer by any such corporation when insolvent, or in contemplation of insolvency, shall be valid in law." In the section next preceding, which prohibits a transfer without a previous resolution of the board of directors, the transfer is not declared void, if made without such authority. According to the familiar rule, "*inclusio unius est exclusio alterius*," there is a strong implication, that the legislature did not intend to declare all transfers void, if not authorized by a resolution of the directors. The implication is stronger, when the clause omitted is, as here, somewhat penal. The object of the eighth section was to guard against fraudulent transfers. The section employed to effect this object, seems to be rather directory in its character, than otherwise. But, if we are wrong in this view, we think another clause of the section shows that the transfer of the note in suit is not one of the transfers or assignments intended to be guarded against.

The concluding part of the eighth section provides, "that the section shall not be construed to render void any conveyance, assignment, or transfer, in the hands of a purchaser for a valuable consideration, and without notice." We consider the plaintiffs such purchasers. If a previous vote of the board of trustees were necessary, there is no evidence that they knew that such vote had been dispensed with. Though the president says, the notes were transferred to the plaintiffs as collateral security, yet they were transferred and applied as the twelfth section of the charter intended they should be applied. They were taken "for the better security of dealers," and were "negotiated for the purpose of paying a claim;" the very end which the charter intended they should serve. The consideration was not only valuable, but derives additional strength from the fact, that it is regarded by the charter as the principal

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one to warrant a transfer. Though the president says, his hope was, that the note would come back to the company, and that they would be able to pay the loss in cash, yet it does not appear that the policy of insurance was retained by the plaintiff, or that the original claim continued alive. The most that the president can be understood to mean is, that he hoped to be able to pay the claim in money before the note matured ; a proposition to which the plaintiffs would, no doubt, have very readily acceded. We think it fairly inferrible that the policy was given up to the company, and that the plaintiffs parted with enough, within the case of *Stalker v. M'Donald*, (6 Hill, 93,) to make them purchasers for value, if the defendant were in a position to object that he came by it otherwise.

But, does it lie in the mouth of the defendant to urge the objection here urged to the manner in which the plaintiffs came by the note? Can he ask protection as the maker of the note, on the ground that it was transferred to the plaintiffs, in fraud of the legal or equitable rights of the defendant? How has he been defrauded? His note has served the very purpose for which he gave it to the company. It has served to pay a just claim of the company. It is not enough for the maker of a note to say, that it was transferred to the plaintiff who prosecutes it, without a valuable consideration; but to defeat a recovery on it, he must show that it was transferred in fraud, or to the prejudice of his rights. It is no defence to an action on a promissory note, that the *property* of the note is in a third person, and not in the plaintiffs. Unless the possession of the note by the plaintiffs, is *mala fide*, and may work some prejudice to the defendant, the latter is not entitled to be heard on the subject. (*Guernsey v. Burns*, 25 Wend. 411. *Hall v. Gird*, 7 Hill, 587.)

In the latter case, it was held, that it was no defence to a suit in chancery, instituted for the foreclosure of a mortgage, that the complainants solicitor, by an agreement between him and his client was to have part of the demand when collected, by way of compensation for his services; and that even at law, the fact that the demand has thus been illegally bought or sold, constitutes no defence to the debtor, in the appropriate

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sense of the term. If the payees of the note here have authorized the plaintiffs to collect it, (which authority is involved in the transfer,) we cannot perceive on what sound principle the maker can be permitted to allege (the plaintiffs being in possession of the note,) that the plaintiffs did not pay value for it, or that a board of trustees did not vote for its transfer, unless he can show that he was defrauded, or lost some defence he might have had against the payees, had they retained it. Here, the defendant had no defence whatever against the insurance company, as the note was given for the purpose of enabling the company to pay claims. How were the defendants rights, in any respect, prejudiced by the transfer? It was not transferred in fraud of any of his rights; and it does not lie with him to object to the manner in which the plaintiffs came by the note. We think the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.(a)

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MOTTRAM and others v. MILLS.

As between the drawer and acceptor of bills of exchange, the presumption of law that the acceptor is primarily liable for their payment, is not overthrown by evidence that they were accepted in respect of consignments of property; it not being shown that the proceeds were insufficient ultimately to meet the bills.

Such bills are not in any sense accommodation paper; and the drawer stands in the place of a surety for the acceptor.

Where the holders of such bills, over due, agreed with the acceptors, that if they would transfer to a trustee all the consigned property, the holders would not hold the acceptors liable upon such bills beyond a specified sum, less than the entire amount, and the acceptors transferred the property accordingly; it was *held*, that the drawer was thereby discharged.

In general, the holder's giving time to the acceptor or discharging him, will be a discharge to the drawer.

Sept 14; Nov. 11, 1848.

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(a) Affirmed in the Court of Appeals, April 17, 1850.

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**ASSUMPSIT** on a bill of exchange for £1000, drawn by the defendant on Major & Wallace, of London, in favor of the plaintiffs, dated November 6th, 1845, and payable sixty days after sight. The bill was accepted by Major & Wallace, November 26th, 1845; and when due was protested for non-payment, and notice thereof regularly given to the defendant. At the trial, the latter read in evidence in his defence, a composition deed or indenture, executed by and between Major & Wallace of the first part, their creditors, holders of certain bills drawn by the defendant and accepted by M. & W., of the second part, and certain persons as trustees of the third and fourth parts; bearing date December 23, 1846. Some of the principal recitals and provisions of this instrument, so far as they bore on the point decided, will be found in the opinion of the court. It commenced with setting forth the failure of Major & Wallace in January, 1846, at which time they were under outstanding acceptances of the defendant's bills of exchange, to the amount of about £22,000. After reciting the dealings between M. & W. and the defendant, as set forth in the opinion of the court; the indenture recited that after their suspension, M. & W. placed in the hands of the trustees, the property consigned and receivable from the defendant, to have the proceeds applied towards the payment of such acceptances. That this was done on the condition that Major & Wallace were not to be held liable upon those acceptances to a greater extent than the clear balance of the proceeds of the defendant's consignments which they had converted and applied to their own use, (exclusive of his acceptances theretofore paid by them.) That such clear balance on taking an account thereof, was £11,074 15s., up to the time when M. & W. stopped payment. That they being unable to pay their creditors in full, had proposed a composition of five shillings in the pound on the £11,074 15s., to be accepted in their notes at three, six and nine months, to be accepted in full of their debts, including the foregoing balance of £11,074 15s. That a dividend of four shillings in the pound was to be paid to the bill holders, out of the assets which had been so placed with the trustees, upon receiving which with the composition notes, the holders of the bills were pursuant to

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the arrangement on which the property was delivered to the trustees, to execute covenants not to sue M. & W. That the dividend of four shillings had been paid, and the composition notes had been delivered accordingly. The instrument, after various provisions as to the property still held by the trustees, then contained covenants on the part of the holders of the bills with Major & Wallace, that they would not sue, arrest, attach or take in execution, or otherwise molest them or either of them, or their property or effects, upon or in respect of those bills, unless they should make default in paying the composition notes or some of them, and a violation of this covenant was to operate as an absolute discharge to M. & W. of the violating creditors' bills of exchange. That upon payment of the composition notes at maturity, the bill holders would, at the request and expense of M. & W., deliver to them a valid and effectual release, discharging them from the bills of exchange, and actions, suits, claims and demands, on account thereof; provided, however, and it was expressly agreed, that it should be lawful for such bill holders to execute those presents without prejudice to their rights and remedies upon the bills against any persons other than M. & W., and against any collateral securities; and that notwithstanding the indenture, they should be at liberty to enforce the bills against such other persons in the same manner as if it had not been executed.

The indenture was executed by the bill holders under their hands and seals, and amongst others, by the plaintiffs, Thomas Mottam & Sons.

It was admitted, that the dividend of four shillings in the pound was paid to the plaintiffs, and the composition notes of Major & Wallace were delivered to the trustees as expressed in the indenture, before the indenture was executed by the plaintiffs.

The cause was tried June 5th, 1848, and a verdict was taken for the plaintiffs by consent, subject to the opinion of the court.

*J. Anthon*, for the plaintiffs.

*E. W. Stoughton*, for the defendant.

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BY THE COURT. SANDFORD, J.—The acceptors of the bill in suit, (Major & Wallace,) are, presumptively, the parties primarily liable for its payment. The burthen of proving a different relation between the drawer and the acceptors, rests upon the latter. The plaintiffs rely upon the recitals in the composition deed, produced in evidence by the defendant, as testimony sufficient to prove that for nearly the whole amount of the bill, the drawer was primarily liable. The deed states, that Major & Wallace had various dealings, in their business as merchants, with the defendant, in the course of which he was in the habit of consigning goods to them, both on his and their joint account, and on his individual account, and of drawing bills upon them generally against such consignments. That when Major & Wallace suspended payments, they had in their possession goods which the defendant had consigned to them on joint account, and bills of lading of other goods on the way consigned in the same manner; that other consignments from him were expected, and they expected a surplus from two consignments which had been deposited with a London house to secure bills accepted and advances made for him by that house. That when they suspended, they had received from the proceeds of the defendant's previous consignments, £11,074 15s. more than they had paid on account of bills drawn by him; but the bills which they had accepted for him, and which were still outstanding, amounted to £22,044 10s.

Leaving out of view for the present, the assets in the hands of Major & Wallace, including the admitted balance in respect of previous payments; this statement falls entirely short of proving as to the residue of the amount of the outstanding bills, that the defendant was primarily liable to pay such residue, as between himself and Major & Wallace. It does not appear that the bills were in any sense, accommodation paper; and as to the state of the accounts between the parties, the deficiency, if there were one, may have been caused by losses on the joint adventures. There is no statement to the contrary, and it was incumbent on the plaintiffs to prove that it belonged to the defendant to pay the deficiency.

But we are bound to take into consideration the assets in

hand, including bills of lading, and the balance due from Major & Wallace on the previous consignments. It does not appear that these were insufficient to meet all the outstanding acceptances; and the whole statement in the deed is consistent with the fact, that on applying all they had received from the defendant, and were certain to receive by the bills of lading in their possession, and charging him with all payments and with the bills then outstanding, the balance would be in his favor.

The evidence derived from the recitals in the deed, is not sufficient to establish affirmatively, that as between the defendant and Major & Wallace, he ought to pay this bill, or any of it; and it is entirely insufficient to overthrow the contrary presumption arising from the acceptance of the bill.

The ordinary relation of drawer and acceptor thus existed between the defendant and Major & Wallace; the latter were the primary debtors to the plaintiffs, the holders of the bill, and the defendant was their surety for its payment.

The defendant contends that the plaintiffs, by giving time to the acceptors, and agreeing to exonerate them, without his assent, discharged his liability. The deed is dated December 23d, 1846, and it recites an agreement made and carried into execution in January preceding, between Major & Wallace of the one part, and the plaintiffs and other holders of their acceptances, of the other part. It does not appear whether this agreement was by parol, or in writing, nor is it material. Its terms were, that Major & Wallace should transfer and deliver to a trustee for the bill holders, all the goods consigned by the defendant, and all the bills of lading which M. & W. then had in hand, together with the right to the surplus of the property lodged as security with the London house; the proceeds of all of which were to be applied to the discharge of the bills, *pro rata*. This transfer was to be upon the express condition, that Major & Wallace were not to be held liable upon or in respect of such outstanding bills, to a greater extent than the admitted balance of £11,074 15s., which they had received from the defendant beyond their payments for him, and which balance they had applied to their own use. There was no reservation

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of the rights of the holders of the bills against other parties, as is attempted in the composition deed. It was an agreement made upon a valuable and sufficient consideration, and it was fully performed on the part of Major & Wallace, as is shown by the subsequent deed. The plaintiffs were therefore obligated, according to its terms, never to sue for or demand from the acceptors, more than the plaintiffs' proportion of the £11,074 15s.

As to the residue of the plaintiffs' bills, they were not only precluded from suing the acceptors, but they had in effect discharged them from its obligation.

It is a general rule, that the holder's giving time to, or discharging the acceptor of a bill of exchange, will be a discharge of the drawer. (Story on Bills, § 425.) The agreement of January, 1846, operated in both modes in favor of the acceptor, and being an entire acquittance as to a part of the bill, prevented the holders from suing the acceptors upon the bill at large, for an indefinite period. We can perceive no reason why the general rule does not apply to this case, and we must hold that the defendant was discharged by the arrangement made by the plaintiffs with the acceptors in January, 1846.

There would have been more difficulty in sustaining the defence, if it rested wholly upon the stipulations contained in the compromise deed of December, 1846; but we are spared the necessity of deciding the point. On the other ground, the defendant is entitled to judgment.



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**WARNER v. PAINE.**

Where, in an action for a libel, the defence set up is that the words were used in the course of a judicial proceeding, and were therefore privileged, the true question is whether they were relevant and pertinent to the matter before the court. As respects matter pertinent and material, the privilege of parties, attorneys, and counsel is complete, and malice cannot be predicated of what is said or written by them.

If a fact be material and pertinent, a party is privileged and protected in setting it forth in an affidavit, though he may have employed stronger and coarser words than are consistent with the rules of good taste and proper decorum.

Accordingly, where, in an affidavit to oppose a motion, the defendant alleged that the plaintiff had been guilty of perjury in his affidavit in support of the motion, it appearing that the falsity of the statements in the plaintiff's affidavit was a material question; *Held*, that no action would lie against the defendant for a libel.

Sept. 10; Nov. 11, 1848.

THIS was an action for a libel, in charging the plaintiff with having committed perjury. The facts of the case are as follows :

In the month of May, 1846, a bill was filed in the court of chancery, by Frances L. Warner, against the defendant and two others, in relation to a certain judgment held by the defendants against the now plaintiff, in which bill it was alleged, upon information and belief, that the defendants Paine and Clason, had purchased the judgment for the purpose of speculation and contrary to the statute, said defendants being attorneys at law. In order to obtain an injunction against Paine and Clason, the plaintiff in this suit made his affidavit, stating that the allegations in the bill, which were upon information and belief, were communicated to the complainant in the bill by himself, and that to the best of his knowledge and belief, such information was truly given, and such facts and matters stated in the bill, were truly stated. Upon this affidavit, an order was granted, that the defendants show cause why the injunction prayed for should not be granted. Upon the hearing of the order to show cause, an affidavit of the defendant Paine,

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was read in opposition to the motion, in which, after denying the facts set up in the affidavit of the plaintiff, he averred that the plaintiff, in swearing that he communicated such facts to Frances L. Warner, and knowing the same to be true, "*had been guilty of perjury.*"

The cause was tried on the 19th day of April, 1848.

Upon the trial, the plaintiff proved by a clerk in the office of the clerk, that a certain bill in chancery in which Frances L. Warner was plaintiff, and the defendant and others were defendants, together with affidavits of the plaintiff and of the defendant, were read on a motion for an injunction, on the 9th of June, 1846, and that such papers were found by the witness in the clerk's office. The plaintiff's counsel then offered to read the papers in evidence. The defendant's counsel objected, on the ground that there was no evidence that such a bill in chancery had ever been filed, nor of the date of the filing of such bill, and that unless the bill was filed, there was no suit pending within the declaration. The judge overruled the objection, and the defendant's counsel excepted. The plaintiff then read in evidence the bill of complaint, the affidavit of the plaintiff, and also the affidavit of the defendant. The witness, on his cross-examination, testified that there was no bill on file in the court of chancery, in the case of Frances L. Warner v. W. H. Paine and others. The plaintiff then called Clason, one of the defendants in the original suit, who testified that in November, 1847, he moved that the bill in the case of Frances L. Warner, be put on file *nunc pro tunc*, and that an order to this effect was entered. This witness also proved the handwriting of the defendant, to the affidavit. The plaintiff rested, and the defendant moved for a non-suit, on the ground that the words alleged to have been spoken, were a privileged communication, and that no actual malice had been proved; and that the papers read had not been proved as laid in the declaration.

The court denied the motion. The jury found a verdict for the plaintiff of \$250.

*J. Anthon*, for the plaintiff. The colloquium need not be proved; for the charge of perjury is of itself actionable.

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The bill of complaint alleged, that the defendant "had purchased a certain judgment contrary to the statute, &c.," as complainant was informed, &c. The plaintiff, to fortify the bill, stated in his affidavit that he had communicated that information to the complainant, and that he had received it from one Griswold, who he believed was interested with Paine in such purchase. Paine, in his affidavit in reply, admitted the purchase, but denied that he had made it contrary to the statute, but on the contrary, stated that he had made it for the benefit of his client. Having thus answered, fully, all that was in issue, he went out of the way, to assail the plaintiff's character, and his motives, by charging him with *wilful and corrupt perjury*. The court of chancery had cognizance of the main fact, "*the bare truth of the charge*." The motives of the parties, and whether wilful and corrupt perjury had been committed, was not in issue, and that court had not power to try it. The attack was wanton and malicious, and made, not to advance the cause of justice, but to gratify passion. There is no reason, therefore, why it should be deemed privileged, or should be protected. (*Thorne v. Blanchard*, 5 John. 508. *Hastings v. Lusk*, 22 Wend. 410. *Rinig v. Wheeler*, 7 Cow. Rep. 725. *Gilbert v. The People*, 1 Denio, 41.)

A. W. Clason, Jr., for the defendant.

I. The declaration avers that the libel complained of was in answer to an affidavit made in a suit in chancery. A suit in chancery must be proved. No bill was ever filed. A suit in chancery cannot be commenced without filing bill. (1 Barb. Ch. P. 1; 1 Dan. Ch. Prac. 454-89. 5 Paige, 80.)

II. A false oath is not perjury, except in the course of judicial proceeding. Unless a suit in chancery was pending, perjury could not have been predicated on the affidavit of Warner. (*Young v. Miller*, 3 Hill, 22; *Brooker v. Coffin*, 5 Johns. 188.)

III. The assertion was in a judicial proceeding, in reply to a judicial proceeding, and is privileged. (*Hastings v. Lusk*, 22 Wend. 410; *Astley v. Young*, 2 Burr. 807; *Hodgson v. Scarlett*, 1 B. & A. 232; *Blanchard v. Thorne*, 5 Johns. 508; Stark. on Slander, 219.)

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IV. *Want of pertinency and materiality* were not shown. This is *indispensable*; even within the *dicta* in *Hastings v. Lusk*. It is averred in the declaration, and ought to have been proved.

V. If not completely privileged, express malice should have been shown. (*Washburn v. Cooke*, 3 Denio, 110.)

BY THE COURT. VANDERPOEL, J.—The plaintiff contends that the words in the defendant's affidavit, imputing perjury to the plaintiff, were not relevant or pertinent to the matter before the chancellor. The defendant contends, that the words or clause in question were pertinent, and that it must be treated as a privileged communication or publication. The fate of the verdict depends upon the result of this inquiry.

There are two classes of privileged communications, recognized in law, in reference to the action of slander. In one, malice is not always to be inferred from the mere speaking or publishing of the words; but the plaintiff will be able to sustain his action of slander, if he can satisfy the jury by other proof, that there was actual malice on the part of the defendant. (*Hastings v. Lusk*, 22 Wend. 410.) In the other class, WALWORTH, Chancellor, says, the privilege is an effectual shield to the defendant; so that no action of slander can be sustained against him, whatever his motive may have been, in using the slanderous words. It was also held by the Chancellor in the above case, that the privilege of counsel in advocating the causes of their clients, and of parties, who are conducting their own causes, belongs to the latter class, when they have confined themselves to what was relevant or pertinent to the question before the court; and that the motives with which they have spoken what was relevant or pertinent to the cause cannot be questioned in an action of slander.

The plaintiff here saw fit to add to the bill in chancery, filed by Frances L. Warner, to enable her to procure an injunction, his own affidavit, that as to the facts stated in the bill to be on the information and belief of the complainant, he was her informant, and that such information was truly given. It appears from the affidavit, that he had also informed her that the de-

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fendant and his partner, Clason, had purchased a claim or judgment with the declared intention of proceeding immediately to execution and a creditor's bill. To this the defendant Paine, in an affidavit read to oppose the motion for an injunction, answered, that he purchased the said judgment and other securities, not for himself, but for his client, and that he had so repeatedly informed the said Warner, both by letter and in person; and that Warner in his affidavit, or in swearing that he communicated such fact to Frances L. Warner, and knowing the same to be true, "*had been guilty of perjury.*"

It is said, the defendant was not justifiable in imputing to the plaintiff, so directly, the crime of perjury. It was certainly competent for the defendant to say, that the allegation of the plaintiff in his affidavit was untrue or false. This was held in *Ashley v. Younge*, (2 Bur. 807.) The opinion of Lord Mansfield, in that case, goes far towards sustaining the defendant here. It was an action for a libel contained in an affidavit of the defendant in resisting a motion in the Court of King's Bench, made by the plaintiff, in which the defendant stated that the plaintiff, in his affidavit, had "*falsely sworn against him.*" Lord Mansfield says, "there can be no scandal, if the allegation is material; that here was a charge against the defendant in a court of justice, made upon oath, and supported by the affidavit of the plaintiff, and in the affidavit of the defendant, in answer to this complaint, he mentions the charge upon him, and denies it, with this conclusion of calling it '*what Sir John Ashley has so FALSELY sworn against him.*'" It was held that the defendant had a right so to characterize the plaintiff's affidavit. Lord Mansfield stopped the counsel for the defendant, remarking that it ought not to be made a matter of question, and that all the judges were clear in the same opinion, that if the matter of fact be justified, the epithets fall to the ground; that the affidavit was taken notice of by the court, at the time when the affidavit was read, and disapproved of as to the word "*falsely,*" which was thought too rough and coarse an expression, and yet, was not judged to require a formal censure from the court.

We cannot perceive why this rule and this reasoning are not

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applicable to the case under consideration. Had the defendant stated, that the plaintiff had sworn falsely, it would be equivalent to saying, he had committed perjury. The only difference between this case and *Ashley v. Young* is, that the affidavit here exceeds the one in the other case in epithetical coarseness, the sense and meaning being the same in both cases. The matter of fact, the materiality of the fact, must only be looked to, in determining whether the matter be libellous. If the fact be material and pertinent, the party setting it forth in his affidavit is privileged and protected, though he may have employed stronger and coarser words than may consist with the rules of good taste and proper decorum. For a violation of the latter rules the court may censure, and perhaps expunge, as was intimated by Lord Mansfield in the case cited; but mere coarseness cannot divest the party of the shield which *the fact* gives him.

We find it quite difficult to come to the conclusion, that the charge of wilful false swearing here was not pertinent to the matter before the vice-chancellor. The plaintiff had given the complainant, as he alleges in his affidavit, all the information stated in her bill to be on information and belief. The veracity of the complainant, to the mind of the defendant, may have been a material question, as it was on his alleged information that the principal statements in the bill rested. The defendant, after this, was not restricted to a mere denial of those facts; nor to the simple statement that the plaintiff was in an error, in respect to them. It was competent for him, if he had reason to think his interest in the suit would be advanced thereby, not only to say that the affidavit of the plaintiff in whole or in part, was false, but wilfully false, which is tantamount to what he did state; *Hodgson v. Scarlett*, (1 B. & Ald. 232;) was an action for defamation, against the late Lord Abinger, for words spoken by him as counsel in a cause, pertinent to the matter in issue. The language of the defendant there was very strong. It was, that "Hodgson was a fraudulent and wicked attorney, and that the act done by him was one of the most profligate things he ever knew done by a professional man." The plaintiff was nonsuited on his opening; and the court, in full bench,

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sustained the nonsuit. Bayley, J. says, "if the epithets were not warranted, the judge, in his summing up, might set it right; but that there were facts in the case that would nonsuit strong expressions on the part of the defendant. The court held, that an action for defamation will not lie against a barrister for words spoken by him as counsel in a cause, pertinent to the matter in issue. If the facts be pertinent or relevant, the party using the words comes within the protection of the law, and this protection will not be forfeited by the use of strong language. As Lord Ellenborough said, in the case last cited, 'there are hardly ever any expressions of discommendation, in which there is not some excess.'"

The privilege of parties, attorneys, counsel and solicitors, is complete as to matter pertinent or material, and malice cannot be predicated of what is so said or written. (*Gilbert v. The People*, 1 Denio, 41.) There, the defendant commenced a declaration which he drew in a justice's court, with matter palpably irrelevant and vituperous. No sane man could have believed it could have any legitimate connection with the suit; and the court justly held the author of it responsible. But where matter is put forth by a party, or his attorney or counsel, in the course of a judicial proceeding, which may possibly be pertinent, courts should not, and will not, feel disposed so to regard it as to deprive its author of his privilege and protection. I concur in the sentiment of our present Chief Justice *arguendo*, in *Ring v. Wheeler*, (7 Cow. 729,) that counsel should not be embarrassed by continually balancing in his mind whether the remark he is about to make be slanderous or not. The privilege to parties to a legal proceeding, or to their attorneys or counsel, is absolute and unqualified, if what they say or state be pertinent, and it is difficult, if not impossible, to find a case where either has been held liable, except where the matter spoken or published was grossly and palpably impertinent. Where it is fairly debateable whether the matter is relevant or not, we would incline to give the party or counsel using the words, the benefit of the doubt which may fairly exist as to its pertinency. In this case, we consider the matter alleged to be libellous, *relevant*.



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**Lowber v. Le Roy.**

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There is another class of cases, which belong to privileged communications in the course of judicial proceedings. It is where words are used in good faith under a *belief* that they are relevant and proper. (*Hastings v. Lusk*, 22 Wend. 421.) In cases belonging to this class, malice in fact may be inferred from the language of the communication itself, as well as from extrinsic evidence. This we held in *Suydam v. Moffat*, (1 Sandf. R. 459.) The present case does not fall within this class. We regard the defendant here as privileged, so that no one can allege that he acted with malice. A nonsuit must be granted, under the stipulation to that effect in the case.

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**LOWBER v. LE ROY.**

The terms of a written contract which are free from ambiguity, cannot be varied or impaired by parol evidence, nor by proof of the subsequent acts of the parties.

Such acts are, in general, not admissible, except in cases of latent ambiguity in the written contract.

The admission of extrinsic evidence to show the condition of the subjects of the contract, and the circumstances under which it was made, rests on a different principle.

The folly or the wisdom of the contract, as one or another construction might be placed upon its terms, is a dangerous element to introduce into the interpretation of agreements.

In applying a contract to its subject matter, the popular meaning of the descriptive terms used must govern, where it is not inferrible from the contract or the subject, that such terms were used in some technical or other sense.

The word "assets," in its common acceptation, means "property."

The word "machinery," though more appropriate to a steam engine and its fixtures, than to a lead pipe machine or a rolling mill, is sufficiently extensive in its meaning to embrace both of the latter; and it was held to include them on the terms of the contract, and the existing facts to which the contract was applicable.

Where by a written agreement for a dissolution of a partnership, which, among other property, owned a steam engine, a rolling mill, and a pipe machine; one of the partners was to take all the *machinery*, and it was clear upon the terms of the writing and the existing circumstances, that this included the steam engine and rolling mill, as well as the pipe machine; the court excluded parol



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evidence which was offered to prove, that the two former were not included in the *machinery*, but were to belong to another party ; and as a part of the parol testimony excluded a written list of assets, subsequently made by a clerk in the presence of the first named partner, and at his request, to show the other party what property he was receiving, in which list (not signed) the two disputed machines were enumerated.

The court also excluded parol evidence of acts of the parties subsequent to the dissolution, offered with a view to show that the two machines belonged by the agreement for dissolution, to the other party.

Sept. 19, 20 ; Nov. 11, 1848.

THIS was an action of assumpsit for money paid, which was tried before OAKLEY, CH. J., in February, 1848.

The plaintiff read in evidence articles of copartnership, dated July 1st, 1845, made between the defendant, Jacob Le Roy, of the first part, and the plaintiff and Thomas Otis Le Roy of the second part ; by which the two latter became general partners under the name of Lowber & Le Roy, and the former, as special partner, contributed \$25,000 as capital. The plaintiff was to contribute as capital \$23,032 50, consisting of his stock and assets in the previous business ; among which was included "machinery and fixtures, \$12,250," consisting of a lead pipe machine hereafter mentioned. The business of the firm was purchasing and selling pig, sheet and bar lead, and manufacturing and selling the plaintiff's patent tin plated lead pipes, in the city of New York. The partnership was to continue five years. The general partners were to devote their whole time and attention to the business ; the profits were to be equally divided between the plaintiff and the defendant. Out of the share of the latter, T. O. Le Roy was at liberty to draw out \$2500 annually. The plaintiff was restricted from selling or disposing of the right to vend or use his patent for tinning lead pipe, without the defendant's consent. At the close of the concern, the plaintiff was to assume \$6000 of the liabilities, in place of the like amount due from him at the outset, which the firm agreed to pay.

The partnership commenced and continued until on or about the 4th of April, 1846. The business had proved to be a losing one, the defendant was not satisfied to proceed with it, and the copartnership was thereupon dissolved. To show the terms of



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Note	American	Exchange	Bank,	due	May 22,	5000 00
"	"	"	"	"	June 21,	5000 00
"	"	"	"	"	May 29,	4500 00
"	"	"	"	"	June 18,	2000 00

"Lowber & Le Roy have also borrowed of Strachan & Scott, eight thousand dollars, to be repaid out of sales of pig lead, a part of which has now been made.

"I am very truly, your obd't.

"ROBERT W. LOWBER."

"P. S. This arrangement is upon the express condition, that all amounts over and above twenty thousand dollars, which may be realized out of the assets given you by Lowber & Le Roy, after paying the notes enumerated in the schedule, shall be paid to me.

Yours, &c.,

"R. W. LOWBER."

"NEW YORK, April 4th, 1846.

"*R. W. Lowber, Esq.*—Sir: The proposition for the dissolution of the partnership of Lowber & Le Roy, submitted by you to me under date of 4th April, 1846, I will accept, provided you accede to the following modification of your proposition. In lieu of the 4th article of your proposition, I propose the following. I agree to lease to you the building now occupied by Lowber & Le Roy, for five years, with the right of renewal for another term of five years, at the yearly rent of three thousand dollars, payable quarterly, provided you give to me David Smith and Edward J. Lowber as security for the due and punctual payment of the rent. The proposition submitted by you to me, is in all other particulars, except the said fourth article above mentioned, to take effect on Monday next, the 6th instant; and the article substituted by me for the said fourth article, shall be complied with on your part on or before the 1st day of May next, otherwise it shall not be binding or obligatory upon me.

Very truly, your ob't. serv't.,

"JACOB LE ROY."

"NEW YORK, April 4th, 1846.

"*Jacob Le Roy, Esq.*—Dear Sir: I am in receipt of yours of

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4th instant, and accept the modification of the fourth article, and engage to take a lease upon the terms proposed, to commence on the 1st day of April, and will, by the 1st day of May, execute a lease with the security you name.

“Yours respectfully,

“ROBERT W. LOWBER.”

It appeared in evidence, that at this time, as well as during the partnership, the machine mentioned in the copartnership articles, which was a lead pipe machine, was mortgaged by the plaintiff to his father-in-law, for its full value. This pipe machine was the only machinery which was in existence when the firm commenced. During the continuance of the firm, the partners had procured what was called a rolling mill for rolling sheet lead, and a steam engine; both of which had been erected in the basement of the building where their business was conducted, and where the pipe machine was situated. The steam engine had been connected with the pipe machine, so as to work it; but the connection with the rolling mill was not fully completed.

The rolling mill had been procured from the West Point Foundry Association, of which William Kemble was the agent. The contract price for it was \$2300, and for this was given the note of \$2300, mentioned in the schedule in the plaintiff's letter of April 4th. In addition to this, the firm at that time owed to Mr. Kemble, agent, for extra work to the rolling mill, about \$1700, which was standing in an open account.

The steam engine had been procured from Stillman, Allen & Co., and the contract price for it was \$3400. The note of \$3000 to Stillman, Allen & Co., mentioned in the same schedule of April 4th, was given towards the debt for the steam engine. At the dissolution, the firm of Lowber & Le Roy owed in account to Stillman, Allen & Co., about \$2000; of which about \$1200 was for work done on the pipe machine and a hoisting apparatus, \$400 was the balance of the contract price of the steam engine, and several hundred dollars was for extra work on the steam engine.

The firm was at that time indebted the sum of \$883 58, to

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James Vandenburgh, for building the foundation, the flue, and the other mason work for the steam engine.

The plaintiff claimed to recover for the amount of the two notes to W. Kemble and Stillman, Allen & Co., and the debt to Vandenburgh, mentioned in his letter of April 4th, which the defendant had agreed to pay in the dissolution, and which the plaintiff insisted he had paid. To prove such payment, he gave evidence tending to show that the week after the dissolution, the defendant declared that he would not pay the same. He then read in evidence an agreement under seal, dated April 6th, but executed April 13th, 1846, between himself of the one part, and T. O. Le Roy and David Smith of the other part. By this instrument, the plaintiff agreed to manufacture for the other parties, (whose firm was T. O. Le Roy & Co.,) patent tin plated lead pipe and other lead pipe, and sheet lead, with all the expedition the machinery and one set of hands would allow, at prices stipulated, delivered on the first floor of the stores where the previous business had been conducted; the manufacturing to be done in the basement. He was to pay \$500 a year rent, and was to allow the use of his steam engine when running, to elevate goods. He was not to manufacture for any one else, while the agreement continued. T. O. Le Roy & Co. agreed to assume the payment of the notes and accounts due to Kemble, and to Stillman, Allen & Co., and the account due to Vandenburgh from Lowber & Le Roy; to secure them in which the plaintiff agreed to mortgage to them the engine, boiler, rolling mill and fixtures, for the sum of \$6000, and that they might retain out of the sums coming to him for pipe and sheet lead, all the surplus, after paying the expenses of running the works, and an annual allowance to the plaintiff for his personal expenses.

The plaintiff then read in evidence another agreement executed between the same parties, dated May 13th, 1846, and substituted for the former. It did not differ from the one dated April 6th, in respect of the mode of payment therein provided for the debts of Lowber & Le Roy, to Stillman, Allen & Co., W. Kemble, and J. Vandenburgh, by T. O. Le Roy & Co.; and it recited that the plaintiff had executed to the parties of

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the second part, T. O. Le Roy & Co., the mortgage for \$6000, on the steam engine and boiler, and rolling mill and fixtures, dated May 6th, 1846. By this agreement, certain other payments were provided for out of the sums becoming payable to the plaintiff for manufacturing.

The defendant, on being called upon, produced the notes to Stillman, Allen & Co., and W. Kemble, mentioned in the schedule and letter of April 4th, which appeared to have been paid. The plaintiff proved that those notes and the account of Vandeburgh, were paid by T. O. Le Roy & Co.

It was proved that T. O. Le Roy and David Smith formed a connection, on or about the 6th of April, 1846, and carried on the lead pipe, sheet lead, and general business in lead, in the same stores which Lowber & Le Roy had occupied. Their business continued to the time of the trial.

The plaintiff next read in evidence, a bill of sale, under seal, executed by him to T. O. Le Roy & D. Smith, dated February 23d, 1847, by which for \$10,143 43, he sold to them the steam engine and boiler, and the rolling mill in question, with all the fixtures and appurtenances. He also read in evidence a release of the same date, executed to him by T. O. Le Roy & D. Smith, discharging him from all demands; also another release, dated February 24th, 1847, discharging him from the above mortgage of the 6th of May, 1846, in consideration of the sale of the machinery, &c., to them. The plaintiff also read in evidence, that mortgage, by which he mortgaged to T. O. Le Roy & D. Smith the steam engine, rolling mill, and all their fixtures, &c., conditioned to pay \$6000, with interest, in one year from date.

The plaintiff then rested his cause.

The defendant called as a witness, David Smith, who testified that he was a clerk of Lowber & Le Roy, and afterwards a partner of T. O. Le Roy. He produced a paper, which he testified was made out on the 5th of April, 1846, by E. J. Lowber, plaintiffs brother, under the direction of the plaintiff, for the purpose of showing to the defendant, what or how much of the assets of Lowber & Le Roy, he would get on the dissolution. It was made at the defendant's request, by the plain-

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tiff, E. J. Lowber and the witness ; and was delivered to the defendant on the 6th or 7th of April. It is in E. J. Lowber's handwriting.

T. O. Le Roy, for the defendant, also testified that the paper was made out to show his father what the assets were, and it was made under the direction of the plaintiff. Both of these witnesses testified to the effect, that on the dissolution of Lowber & Le Roy, the steam engine and rolling mill, with all their fixtures and appurtenances, went to the defendant ; that he took possession of the same with the other assets, on Monday, the 6th of April ; that within four or five days after, he sold to T. O. Le Roy & Smith all the assets of the late firm, including the engine, mill and fixtures for \$10,000, for which they gave their note to the defendant, and agreed to pay all the liabilities he had assumed ; that they thereupon continued the lead business as partners ; that soon after they bought the engine, rolling mill, &c., of the defendant, they sold the same to the plaintiff for \$6000, to secure which he gave them the mortgage thereon. And that they paid the notes to W. Kemble and Stillman, Allen & Co., and the account to Vandenburg, in consequence and by reason of their assumption thereof with the defendant. T. O. Le Roy stated that the losses of Lowber & Le Roy, were about \$18,000.

The paper called the *list of assets*, so produced and proved, was read as follows ; (the plaintiff's objection to the testimony being reserved :)

“ ASSETS.

“ We have on hand account on book amounting to		\$22,818	81
“	“ bills receivable,	5750	48
“	“ sheet lead,	34 112 4 20	1432 70
“	“ lead pipe,	37 492 4 50	1687 14
“	“ old lead,	8 056 3 50	281 96
“	“ block tin,	1789 23	411 47
“	“ lead at Cornell's,	43 655 3 75	1634 6
“	“ 1 safe,		150 00
		<hr/>	
		\$34,166	52

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<i>Brought forward,</i>		\$34,166 52
We have on hand	1 stove,	36 80
"	" 5658 pigs lead, 374 424	12,945 90
"	" machinery, (mill and engine,)	5300 00
"	" cash,	1754 00
		<hr/>
bills payable,		\$44,203 32
Due April 26, Sun	Mutual Ins. Co.,	\$301 25
" July 25,	" "	55 61
" May 20,	Stillman, Allen & Co.,	3000 00
"	Jas. McCullough,	5767 64
" June 13,	William Kemble, agent,	2300 00
" May 18,	American Exchange Bank,	4000 00
" " 22,	" "	5000 00
" June 21,	" "	5000 00
" May 29,	" "	4500 00
" June 18,	" "	2000 00
" April 10,	" "	4000 00
" June 6,	" "	4000 00
		<hr/>
		39,924 52
		<hr/>
		\$14,278 82
Deduct item below, (sundry small bills which we		
have not been able to get in, estimate at)		500 00
		<hr/>
		\$13,778 82
		<hr/>

It was testified by Smith in his further and cross examination, that the note of \$10,000, given to the defendant, was subject to adjustment, according as the affairs of Lowber & Le Roy should wind up. T. O. Le Roy & Co. were to allow him in such adjustment, \$5300 for the engine, rolling mill and fixtures. They had paid him one year's interest on the \$10,000. There was no written evidence of the sale of these articles to them, or of the sale by them to the plaintiff. On the 5th of April, an agreement was drawn up by Smith, (the terms having been directed by the defendant,) to be signed by the plaintiff and T. O. Le Roy. The plaintiff was present when it was



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drawn. It was afterwards rejected by the defendant, and was never executed. The prices for manufacturing were objected to. This paper was produced, and was in its scope similar to the one executed April 13th, as before stated, except that there is no provision for paying the debts of Lowber & Le Roy, which are specified in the latter.

An account rendered by T. O. Le Roy & Co. to the plaintiff, under the date of January 19, 1847, was produced. The first charges in it are the notes to W. Kemble and Stillman, Allen & Co, under date of April 6th, 1846. The accounts paid to them respectively and to Vandenburg, were charged under subsequent dates. There was no charge in the account for the machinery alleged to have been sold to him, but in their ledger, it was charged to the plaintiff at \$5300, under date of April 6th, 1846. Those notes were not charged to the defendant in T. O. Le Roy & Co.'s books, nor was the payment to Vandenburg.

Edward J. Lowber, for the plaintiff, testified, that the paper called the list of assets, was not made up under the plaintiff's direction ; that it was made out by Smith and the witness, that Smith might see whether it was safe to give the defendant \$10,000. There was much additional testimony on both sides, but it is believed enough has been stated, to render intelligible the points of law discussed before the court.

The defendant's counsel requested the judge to charge the jury upon certain propositions, substantially as they are contained in the points on the argument.

The judge then charged the jury, that at the time of the dissolution of the firm of Lowber & Le Roy, that firm owed to Stillman, Allen & Co., \$3000, to William Kemble \$2300, and to Vandenburg \$883 58. The plaintiff contends, that by the agreement of dissolution, the defendant was bound to pay these debts, but failed to do so, and that he, the plaintiff, has been obliged to pay them.

The agreement is in writing, and it is not denied that by its true construction, the defendant was bound to pay these debts. It is contended, however, on the part of the defendant, that these debts were paid by the new firm of T. O. Le Roy & Co.,

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under a contract between him and T. O. Le Roy & Co., by which, in consideration of his transferring to them certain assets, including the engine and rolling mill, they assumed his obligation and undertook to pay those debts.

The plaintiff contends, that the mill and engine became his sole property by the terms of the agreement of dissolution, and that the debts in question were paid by the firm of T. O. Le Roy & Co., out of the property of the plaintiff, to wit. : the engine and rolling mill, and such payment charged by them to the plaintiff; and the case turns upon the truth of the one or other of these propositions.

And in reference to the law bearing on the questions thus stated, the judge gave the jury the following instructions :

*First.* That by the terms of the contract, the property in the engine and mill vested in the plaintiff, and those terms being clear and free from any ambiguity, no parol evidence is competent to vary it.

*Second.* That the statement of assets cannot affect the contract, unless it had been annexed to or made a part of it, by being communicated to the defendant at or before the final making of the contract.

*Third.* That a payment of the debts in question by T. O. Le Roy & Co., out of the property of the plaintiff, if it was so made, was as effectual to authorize the plaintiff to recover as a direct payment by himself; and with these instructions, left the case to the jury on the evidence. To which charge of the judge, the counsel for the defendant excepted, and also excepted, because the judge refused to charge the jury as requested.

The jury found a verdict for the plaintiff for \$6920 32, and the defendant moves for a new trial.

*J. W. Gerard*, and *H. Ketchum*, for the defendant, made the following points.

I. The list of assets, and the contemporaneous and subsequent acts, declarations, and dealings of Lowber, and all the parties, show that on the dissolution, the steam engine and rolling mill were to pass to Jacob Le Roy.

Every probability is in favor of the theory, that this engine

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and mill, as part of the assets of the firm of Lowber & Le Roy, were to pass to the defendant; from the large capital he put in, from the losses of the firm, \$18,000, from the small value of the assets without the engine and mill, and from the assumption of the debts of the firm by the defendant, including the three debts in question.

II. The judge erred in excluding in his charge, the list of assets, and all the contemporaneous acts and declarations of Lowber, from the consideration of the jury, and in deciding that the letter of dissolution of the 4th of April, was free from all ambiguity, and that by it, as a matter of fact, the engine and mill were to be the property of Lowber.

Under the evidence, that paper contained a latent ambiguity as to the term "*assets*," which were to go to the defendant, and what was the "*machinery*," which was to pass to the plaintiff; and the list, and other contemporaneous acts and declarations of the plaintiff, were admissible to apply the contract to the proper subject matter. (Chitty on Cont. 104 to 106.)

The terms "*assets*" and "*machinery*," on the face of the letter of the 4th of April, are indefinite and uncertain as to the things that would pass; and they are rendered more so by the evidence that there were two sets of machinery, the old pipe machinery repaired, which Lowber had brought in, and the engine and mill which the firm had made. The term "*machinery*" included the pipe machine, but not the mill or engine.

The two papers, dated the 4th and 6th of April, formed but one contract. The contract was not completed until the 6th of April, when the articles were delivered. The first was made out and rendered to Mr. Le Roy, to particularize, as by a partnership account of stock, what assets were to pass under and be delivered with the letter of dissolution. (1 Phill. Ev. 562; Cowen & Hill's Notes, 1398, 1400, 1401, 1406, 1408, 1409, and 1367, 1368, 1387, 1392, 1395, 1399, 1411; 19 Johns. 313; 1 Stark. Rep. 210; 12 Wend. 573; 4 Hill, 104; *Chapman v. Black*, 4 Bing. N. C. R. 187, 193, 196.)

III. The judge should have submitted the inquiry to the jury,

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whether the parties did not intend that the letter or agreement to dissolve and the list should form one contract.

IV. The judge erred in not charging the jury as requested, that, if by virtue of a new contract of sale of the engine and mill by T. O. Le Roy & Co. to the plaintiff, he, the plaintiff, paid these notes himself, or through T. O. Le Roy & Co., as the consideration for the purchase of those articles, he cannot recover.

V. The judge erred in not charging the jury as requested, that if they believed the testimony of Smith and T. O. Le Roy, that the firm of T. O. Le Roy & Co. took the mill and engine as the property of Jacob Le Roy, then the moneys paid by them in taking up the notes were not paid by the plaintiff.

VI. The verdict is contrary to law and evidence.

*C. O'Connor*, for the plaintiff, made the following points.

I. The agreement of dissolution, in plain and unambiguous language, made a division of the copartnership property, assigning to the plaintiff the engine and rolling mill as well as the other machinery.

1. The contract was perfect on the 4th of April, 1846.

2. The exception in clause fifth, coupled with the list of bills payable, and the fact that there were no other bills payable for machinery, except the two notes in question, precludes all doubt that the words "all machinery" included the engine and rolling mill.

II. The documentary evidence given by the plaintiff touching his transactions with T. O. Le Roy & Co., subsequent to the dissolution of Lowber & Le Roy, was not introduced by him to qualify or explain the agreement with Jacob Le Roy. It was necessarily given to establish the independent fact, that he, the plaintiff, had paid the notes in question. The necessity which compelled a resort to this evidence for such independent purpose, justified the resort; and consequently the defendant did not acquire any greater right to invoke such testimony to explain the agreement, than he would have possessed in case the evidence was originally offered by himself.

III. Under these circumstances, the paper called a schedule

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of assets was not admissible to contradict, vary, or explain the agreement.

1. It was made after the written agreement was perfect and consummated.

2. It was not signed by either party, and is not in the handwriting of either party.

3. It is not authenticated in any way as the act of either party.

4. It is not annexed to the agreement, and cannot be connected with it in any way, except by mere oral evidence of imputed intentions, not made apparent by any thing done, or any written memorial.

5. It is so vague and indefinite in its import, that if actually annexed to the written agreement, the legal construction would not be varied.

IV. The whole case shows, that the defence attempted had no foundation in truth or justice.

1. Smith and T. O. Le Roy swore, that the defendant did not know what he was to receive on the dissolution, and the rejected agreement of April 6th shows, that they understood the machinery, including the steam engine, to belong to Lowber.

2. All the documentary evidence is consistent with itself, and supports the plaintiff's theory of the case.

3. None of the documentary evidence supports the defendant's theory, and most of it conflicts therewith.

V. It is perfectly manifest, that justice has been done according to law ; and the verdict ought therefore to be sustained.

BY THE COURT. SANDFORD, J.—The agreement between the parties, for the dissolution of the firm of Lowber & Le Roy, the disposition of its property, and the payment of its debts, was in writing, and was signed and delivered on the 4th day of April, 1846. The effort on the part of the defendant at the trial, was to influence and control the effect of this agreement, by a writing or schedule without signature or authentication, made out on the 5th of April, together with parol evidence of what was subsequently agreed upon between these parties and T. O. Le Roy & Co. The judge, after receiving the

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testimony provisionally, instructed the jury that the terms of the agreement for dissolution, being clear and free from ambiguity, no parol evidence was competent to vary it; and that the list of assets could not affect it, unless it was annexed to the agreement, or was made a part of it by being communicated to the defendant before the final making of the agreement. The case turns upon the soundness of the judge's construction of the terms of the contract executed by the parties; for if those terms were free from ambiguity, clear and explicit; no one questions that it was incompetent to vary or impair them by parol evidence.

The proof of subsequent acts, falls equally within the well established rule excluding oral testimony. Where the contract has been carried into effect, the acts of the parties furnish more satisfactory evidence than their words, when the contract itself contains a latent ambiguity; but where its terms are clear, such acts are inadmissible to vary or control its construction. The defendant relied much upon *Chapman v. Black*, (4 Bing. N. C. 187,) which was the case of a lease made out by letters, and there being great doubt on the language of the letters whether the parties had agreed for a present demise, or to draw up and execute a lease at a future time, evidence of possession and payment of rent was admitted in aid of the construction. Strong language was used by two or three of the judges, in respect of the competency of acts, as indicative of intention, but they were applied to the strong features of the case before them; while one judge, without referring to the acts at all, found sufficient in the letters to construe them into a present demise.

In this, and in several other reported cases in England, on the same question of a lease *in presenti*, or an agreement to lease; there is no conflict with the rule of law to which we have alluded. The evidence was admitted on the express ground that the instruments in writing were ambiguous, in respect to the subjects to which they were applicable, or upon which the intention of the parties was brought to bear.

The admission of extrinsic evidence, to show the condition of the subjects of the contract, and the circumstances under

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which it was made, is a wholly different matter, and one upon which there is no dispute here. Nor was it seriously contended, if there were no latent ambiguity as to the terms of the agreement for dissolution between these parties, that either the list of assets, or the subsequent acts, would be competent to influence its construction.

We must therefore ascertain whether there was any latent ambiguity in the agreement. The defendant insists that the term *assets*, and the term *machinery*, as used in the contract, were thus ambiguous; and require the aid of the acts and declarations of the parties, in order to give them a sensible construction.

First. As to the word "assets." This is equivalent in its common acceptation to the term "property," and as used in this instrument, embraced all the property of Lowber & Le Roy which was not excepted. The defendant needs no evidence to explain a word which plainly gives to him all that the firm had, save so far as it is controlled by a clear exception. The exception here is "the machinery," and whatever "appertains to or belongs to the machinery."

Second. This brings us to the real point in controversy, was there any latent ambiguity in this contract, in respect of what was intended by the word "*machinery*?"

In its primary signification, this word would rather include the steam engine and fixtures, than either the pipe machine or the rolling mill; the two latter being more properly *machines*, and the former the combination of powers to put them in motion. The defendant's object, is however, to withdraw the steam engine, as well as the rolling mill, from the operation of the term used in the contract.

We do not think that we can assume that a word of such extensive application in common parlance, as is the word "machinery," is to be construed and defined when used in a contract, with the nicety of the lexicographers. And we must have recourse to the facts and circumstances upon which the contract was made, in order to apply its terms to the objects of the contract. In applying it to those circumstances, the popular meaning of the terms must govern, when it is not inferrible

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from the contract or its subject matter, that they were used in some technical or other sense.

When Lowber & Le Roy dissolved, they had assets of all the kinds enumerated in this agreement, and they were indebted for the debts therein enumerated, besides the accounts for extra work on the engine and rolling mill. The assets, which one or the other of the parties insists constituted the machinery, were first, the pipe machine, second the steam engine, and third the rolling mill. The pipe machine was the plaintiff's before the partnership. It was incumbered to its full value, so that it was of no particular advantage for any one to take, except for immediate use. There was no claim for or upon it, against the firm, by way of note or obligation; but there was an account against the firm for repairs done upon it by Stillman, Allen & Co., to the amount of about \$1200.

The steam engine was new, and so far as it appears, worth all it had cost. The firm owed its entire cost, of which \$3000 was in a note to Stillman, Allen & Co.; and \$400 of the contract price, with about the same amount for extra work, was due to that firm in an open account. The rolling mill was also new, and had never been used. The firm owed its whole cost to Mr. Kemble as agent for the West Point Foundry, of which \$2300 stood in their note to Mr. K., and the extra work, about \$1700, in an open account.

Now by the first stipulation in the contract, the defendant was to pay all the outstanding notes against Lowber & Le Roy. Of course he was to pay the note of \$3000, given in part payment of the steam engine; and the note of \$2300, given for the rolling mill, exclusive of the extra work. By the third stipulation he was to have all the assets, "not appertaining or belonging to the machinery."

By the fifth stipulation, the plaintiff was to take "*all the machinery* and such things belonging thereto" then on hand, and he was to pay all claims yet due thereon except such as were mentioned in the schedule of bills payable. The only claims of the kind mentioned in the schedule, were the notes to Kemble for \$2300, and to Stillman, Allen & Co. for \$3000. Finally, the plaintiff, for the security of the firm that he would



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pay the debts he assumed, was to give the defendant security upon the machinery he was to take.

Now applying these terms to the actual condition of things, and is there any room for a doubt as to what was intended by the word "machinery?" Can it be answered by the pipe machine, excluding the other two?

The plaintiff was to pay all claims due on the machinery, except the bills in the schedule. But there was no bill or demand in the schedule which had ever been a claim upon, or in any mode grew out of the pipe machine. So that this language could not be applied to the pipe machine at all. How does it apply to the two others? It is obvious that the application is perfect. There was a claim due and mentioned in the schedule, on the steam engine; there was a like claim mentioned in the schedule and due on the rolling mill. Thus one of the most important clauses of the contract, is made senseless by restricting the word "machinery" to the pipe machine, while it has full scope and bearing when extended to the other two articles in dispute.

Take the next provision. The plaintiff was to pay the claims due on the machinery he was to take, except the two notes. There were such claims due on all three of the machines, (if we may so class them,) and thus the stipulation has full effect to provide for nearly \$4000 of accounts due for extra and other work on those machines. But if we exclude the steam engine and rolling mill, there remain more than \$2500 of accounts for work done on them, for the payment of which there is no provision in the dissolution; for the defendant bound himself to pay only the scheduled debts, and these are not scheduled; and the plaintiff was not to pay any claims except on the machinery that he took. Thus if "machinery" included all the three machines, the fifth article is full of meaning and every word of it applies to an existing object; if it did not include all three, the article is senseless, and the whole agreement defective in omitting to provide for what it professed to embrace.

The sixth stipulation, it is urged, shows a different meaning, in the expression, "machinery I am to take;" that this shows

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there was machinery which the plaintiff was not to take. We do not think such an inference is legitimate from the language used ; and when the stipulation is considered in the construction which the defendant desires to put upon the word "machinery," it leads to a very different conclusion. If that construction be correct, the plaintiff was liable to pay merely the \$1200, due to Stillman, Allen & Co. for repairs &c., on the pipe machine ; and he was to make the defendant secure that he would pay it, by a mortgage on the pipe machine. In other words, for the sake of obtaining a machine mortgaged for all it was worth, the plaintiff was to pay \$1200 ; and the defendant was gravely to take security on the same incumbered machine that he would pay it punctually.

There is no such absurd consequence, if we consider the term "machinery" as embracing all three of the articles in question. The sixth stipulation, as well as the others, then becomes sensible and operative upon existing things and circumstances.

Upon the whole, after a careful examination of this instrument, in connection with the state of things actually existing and upon which it professed to operate, we cannot find a shadow of ambiguity in its terms. The word "machinery," in its popular sense, would probably embrace engine and rolling mill, as well as the pipe machine ; and as used in this agreement, it cannot mean any less than the three.

We were much pressed with the extreme improbability of the defendant's making such a contract, as he did make, upon this construction of the agreement for dissolution. As to this, we cannot tell how anxious the defendant was to put an end to the partnership, nor what other motive may have influenced him. The folly or the wisdom of the contract, as one or another construction might be placed upon its terms, would be a dangerous element to introduce into the interpretation of agreements. It suffices for this case, that whatever were the views of the parties, they have expressed their agreement in terms too plain to be doubted or misunderstood.

As the *list of assets* was not made until the agreement for

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dissolution was complete and perfect, the judge was correct in excluding it from the consideration of the jury.

The conflicting testimony of the subsequent acts and parol agreements of the parties, had much less to recommend it than the list of assets; and its exclusion with the latter was a matter of course.

The defendant makes a further point, that if by virtue of a new contract of sale of the engine and rolling mill by T. O. Le Roy & Co. to the plaintiff, the latter paid the demands in question himself or through that firm, as the consideration for the purchase of those articles, he cannot recover.

This consequence would not necessarily follow from such a sale as was supposed, because the defendant is not connected with it; and if the plaintiff chose to pay these demands, and at the same time and in the same transaction buy his own property of T. O. Le Roy & Co., it would still be money paid for the defendant. But the conclusive answer to the point is, that the plaintiff having become the owner of the mill and engine by the dissolution agreement, must be assumed to have first sold them to Le Roy & Co., or to some person from whom they bought, before there could be a sale to him by that firm. Nor would it alter the case, if T. O. Le Roy & Co. took the mill and engine as the property of the defendant; so long as it was in fact the plaintiff's property and was used to pay the defendant's debt. The controlling feature in the cause, is the effect of the agreement for the dissolution; and as we have been unable to go behind what we conceive to be its plain and explicit terms, awarding the engine and mill to the plaintiff; the defence is at an end.

Motion for new trial denied.

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Carter v. Dallimore.

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## CARTER v. DALLIMORE and others.

The marine court, although for some purposes a court of record, is not authorized to give a judgment upon a default, without proof of the plaintiff's demand. Although the appellate court will not weigh the evidence below so as to reverse if it merely preponderates against the judgment ; a material defect of proof is fatal to the judgment below.

Nov. 18th ; Dec. 9th, 1848.

APPEAL from a judgment rendered against the defendants in the marine court. The matters involved appear sufficiently in the opinion of the court.

*S. P. Nash*, for the appellants.

*O. W. Sturtevant*, for the respondent.

BY THE COURT. SANDFORD, J.—The evidence in the court below, was entirely insufficient to warrant a judgment against the defendants. It is however contended by the plaintiff, that the default of the defendants to appear, dispensed with full proof ; and that this court will not weigh the evidence.

1. As to the latter point, we are required by the code, to give judgment according to the justice of the case. (Section 317.) The principle laid down in *Stryker v. Bergen*, (15 Wend. 490,) is therefore applicable ; and a material defect of proof is fatal to the judgment below.

2. The marine court, although for some purposes a court of record, is not authorized to give a judgment upon a default, without proof of the plaintiff's demand. The statute creating the court provides, (2 R. L. 386, § 122,) that upon the return of a summons served, the court shall proceed to hear and examine the proofs and allegations of the parties. No distinction is made between cases in which the defendant appears, and those in which he makes default. The court, in all alike, is to hear

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and examine the proofs, and give judgment thereon agreeable to law and equity.

So in the statute relative to courts held by justices of the peace, (2 R. S. 242, § 92,) whenever the defendant neglects to appear, on personal service of the summons, the justice is to proceed and must hear the proofs and allegations of the plaintiff, and determine the same according to law and equity.

The same provision has been embraced in every act for the recovery of small debts from 1787 to the revised statutes, and in the same language, except that in the acts prior to the revised statutes, the justice was directed to hear the proofs, &c., of the *parties*. And under those statutes, while the supreme court exercised a direct appellate jurisdiction, it uniformly reversed, where there was a defect of proof, or where the recovery was for a different cause of action from that declared upon. Some of the prominent cases are cited by Bronson, J. in 15 Wend. 491, and they are very numerous.

It suffices to say that they establish most fully, that the default of the defendant to appear, concedes nothing in favor of the plaintiff's demand, and that his claim must be sustained by proof.

Judgment set aside and new trial ordered in the court below.

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PARKER v. ELLIS and others.

Where a debt is contracted by several persons, for a common purpose, and one of them pays the whole debt, he may sue each of the others separately at law, for his aliquot share of the debt; but he cannot single out a part of the number and maintain a joint action against them.

In equity, however, if either of the joint debtors is insolvent, he who has paid the debt has likewise a claim against each of those who are solvent, to pay the proportion which they ought, respectively, to bear of the loss arising from such insolvency.

Nov. 22; Dec. 9, 1848.

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Parker v. Ellis.

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THIS was an appeal by the plaintiff from a judgment rendered by an assistant justice of the city of New York. The action was brought by the plaintiff, who was the captain of the "Union Rifle Company," against the defendants, who were members of the company, to recover the sum of \$24 32, being moneys paid by the plaintiff for the use of the company. The defendant Ellis, was lieutenant of the company; Gilhooly, another defendant, was treasurer; and Ballou, the third defendant, was a private therein. There were also some twenty other members. A bill was introduced in evidence, and proved, rendered by the New York Gas Light Company to the plaintiff, for gas furnished the drill room of the company. The bill was made out against the plaintiff, and was paid by him. The plaintiff proposed to prove by members of the company, that the defendants were also members of the company during the time the gas was furnished. The defendant's counsel objected to their testimony, on the ground of their incompetency. The witnesses were then released, and testified that the defendants were members of the company. The defendants moved for a nonsuit on the grounds, that the payment of the bill was voluntary on the part of the plaintiff; that no joint liability by the defendants to the plaintiff was proved; that the parties, being all members of the same company, an action at law could not be maintained by one against the others, or any portion of the others; that the release to the plaintiff's witnesses discharged the action; and that the plaintiff should have produced the Roll Book of the company, as the only proper evidence to show who were members. The justice rendered a judgment of nonsuit.

*P. J. Joachimssen*, for the plaintiff in error.

*F. Byrne*, for the defendants in error.

BY THE COURT. VANDERPOEL, J.—It does not appear from the return, that the plaintiff contracted on his own behalf exclusively for the gas for which he paid, and on the strength of which payment he brought this action before the justice. The

evidence is, that there were at least twenty members of the company, besides the three parties to the suit. The defendant Ellis was lieutenant, Gilhooly treasurer, and Ballou a private. Two questions arise :

1st. Can the plaintiff maintain any action against the defendants, or either of them ?

2d. Can he single out these three, and maintain a joint action against them ; or must he sue each separately ?

It does not appear that the plaintiff, when he made the payment, required any subrogation ; still he is not wholly remediless. I have not found in any common law compiler or commentator so clear, full and satisfactory an exposition of the rule which is to govern cases of this description, as is to be found in Pothier. (1 Poth. on Ob. 145, Phil. Ed. of 1824.) He says, that although a debtor *in solido* has omitted, at the time of payment, to require a subrogation, he is not, therefore, destitute of all redress, but has on his own account, an action against each of his co-debtors for the repetition of their several proportions ; that when the debt is contracted by several persons for a common affair, the debtor who has paid the whole has against each of the others, the action *pro socio*. He has this action against each of them for the share which they respectively had in the common subject, which is the foundation of the debt. This is the rule of the common law also. In equity, however, if any one is insolvent, he who has paid the whole, has likewise a claim against each of those who are solvent, to pay the proportion which they ought, respectively, to bear of the loss arising from such insolvency ; for, as Pothier justly remarks, insolvency of any one is a loss to the body at large, which ought consequently to fall upon each of the members in proportion to his share.

The case of *Cowell, Adm'r. v. Edwards*, (2 Bos. & Pul. 268,) has a direct bearing upon the present case. John Cowell, the plaintiff's intestate, having entered into a joint and several bond with seven other persons, two of whom were principals, and five others, as well as himself, sureties, was, together with his co-sureties, called upon to pay the sum engaged for. The defendant and two of the other sureties, paid each a part of that

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sum, but the plaintiff's intestate paid the residue. Upon this, the plaintiff, considering the defendant and one of the two sureties who had already contributed, as the only solvent sureties, called upon them to pay their proportion, and then brought his action to recover from the defendant such a sum of money as, when added to what had already been paid by him, would make up one third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety, not called upon in that suit. Lord Eldon, Ch. J., said that he had conversed with Lord Kenyon on this subject, who was also of opinion that no more than an aliquot part of the whole, (one sixth,) regard being had to the number of co-sureties, could be recovered *at law* by the defendant, though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a court of equity. In *Child v. Mosely*, (8 T. R. 614,) Lord Kenyon speaks approvingly of a case in Rolle's Abridgment, where a party met to dine at a tavern, and after dinner, all but one of them went away without paying their quota of the reckoning, and that one paid for all the rest; and it was held, that he might recover from the others their aliquot proportions. If each party is liable for his aliquot proportion, no joint promise to the plaintiff here can be implied, so as to enable him to maintain a joint action against three of the twenty odd members of the company. Each is liable for his proportion. The plaintiff surely cannot on any principle, recover the whole from those three, with the exception of his own share. If he can recover the shares of three in a joint action, he may in other suits, join two, three, or four, at his option, a proceeding which would be wholly inconsistent with the most familiar principles of the common law. We are of opinion that the justice very properly gave judgment for the defendants.

Judgment affirmed.



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Partridge v. Thayer.

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## PARTRIDGE and GOOLD v. THAYER and TRUESDALE.

Where a summons in the marine court required the defendants to answer in a plea for goods sold to the defendants, damage fifty dollars, the plaintiffs cannot take judgment by default for more than fifty dollars. If they do, the judgment will be reversed.

The code of procedure regulating appeals from the marine court, in effect requires the appellant to state the substance of the proceedings below, where the alleged error consists of those ; and the substance of the testimony when the latter bears upon the question sought to be reviewed. Where the whole reliance of the appellant is upon an error which cannot be remedied or affected by the testimony, it is not necessary in his affidavit to set forth the evidence.

Nov. 27 ; Dec. 9, 1848.

THE defendants appealed from a judgment of the marine court taken against them by default, they not having appeared before that court. The questions raised are stated in the opinion of the court.

*H. R. Pierson*, for the appellants.

*G. Bradshaw*, for the respondents.

BY THE COURT. SANDFORD, J.—In this case, the judgment upon a default of the defendants below, was taken for \$91 50, damages, on a summons which required them to answer to the plaintiffs in a plea or complaint for goods sold and delivered and for rent, to their damage of fifty dollars.

The act creating the marine court, (2 R. L. 383, § 113,) prescribes the form of the summons to be issued out of that court ; and among other things, it is to contain the nature or cause of action, and the sum demanded. The insertion of the amount of damages, therefore, was not a mere form, which might be observed or disregarded, without prejudice to the rights of the parties. As the statute required it, the defendants were at liberty to rely upon the statement as being truly made. If they had no defence to the claim thus made, it was unnecessary for

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them to attend the court, either to make a show of defence or to confess the action.

In courts of record, the plaintiff could not take judgment upon a verdict, much less upon a default, for a greater sum than that stated in his declaration. The reason is much stronger for restricting him to the damages claimed in this process, where the statute makes it incumbent on him to set forth the sum demanded.

It does not relieve the plaintiff, to show that the error arose from the inadvertence of the clerk of the court below. The defendants relied on the process, and it makes no difference how the mistake occurred, so long as it is not pretended that they knew it was a mistake.

The judgment below was, on this ground, clearly erroneous.

It is claimed nevertheless, that the merits being wholly with the plaintiffs, this court, in giving "judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits," (*Code of Procedure*, § 317;) should affirm the judgment.

The difficulty is that we cannot know what are the merits of the case beyond the \$50.

The defendants have had no opportunity to be heard in their defence, as to the surplus beyond that sum. The testimony before the court below, was sufficient to establish the plaintiffs demand for the account recovered, unless it could be controverted; but we cannot know, on this record, whether there was a defence or not. We can see that there was none to the extent of fifty dollars; beyond that, we have no legal information on the subject.

An objection to the entire appeal, is taken on the ground that the affidavit on which it was founded, omits to set forth the substance of the testimony in the court below, as is required by section 303 of the code.

This objection should have been taken by a motion to dismiss the appeal; and not upon the argument of the cause. We think also, it is unfounded. Where the appellant relies upon any point arising upon the testimony below, he must undoubtedly set forth its substance. But where his whole reliance is

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upon an error which does not grow out of the testimony, and which no possible state of the evidence below could remedy, it cannot be necessary for him, in addition to such point, to set forth the evidence which was given. The statute, in its true construction, requires the appellant to state the substance of the proceedings, where the alleged error consists in them ; and of the testimony, when the latter bears upon the question sought to be presented to the appellate court. It does not require both, when the error is founded solely upon the one or the other.

We were at first inclined to direct a new trial, on payment of costs ; but it would be necessary to amend the summons and allow the defendants to plead, before a trial could be had ; and upon the whole, we think it better for the plaintiffs to begin anew.

Judgment reversed.

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WILLIAMS and RAY v. PRICE.

The summons in the marine and justice's courts, is not in its form, governed by the provisions of the code of procedure.

The pleadings in those courts may be oral, and therefore the provision of the code of procedure requiring pleadings to be verified does not apply to those courts.

Nov. 18 ; Dec. 9, 1848.

APPEAL by the defendant from a judgment rendered against him in one of the assistant justice's courts. The questions decided are stated in the opinion of the court.

*E. C. Gray*, for the appellant.

*J. H. Applegate*, for the respondents.

BY THE COURT. SANDFORD, J.—The appellant has made several points, which are wholly unfounded.

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1. The summons, it is said, did not state the cause of action, as required by the code of procedure.

2. The complaint is defective for the want of a verification.

As to both of these points, the answer is, that the code of procedure has no application to the summons, nor to the declaration in the matter alleged as error. The last eight titles of the second part of the code, do not relate to actions in the marine court or in the justice's courts; except so far as certain sections and provisions are made applicable in express terms, in the other titles. (See Code, § 8.) Thus by § 61, the provisions of the sections from 48 to 57 inclusive, relating to forms of action, to pleadings, &c., are made to apply to the courts, embraced in title 7th of part first, which title includes the marine and justice's courts. And section 57 extends the provisions of the whole act, respecting the forms of actions, pleadings, the rules of evidence, and the time of commencing actions, to courts of justices of the peace, except that the pleadings may be oral, and made at the same time as if the act had not been passed.

The effect of these provisions is, that the summons in the marine and justices courts is not governed by the code at all, in its form; and the pleadings may be as before, oral, and even more liberally construed. It was always requisite in the marine court to state in the summons, "the nature or cause of action." (2 R. L. 384, § 113.)

The provision in the code for verifying pleadings, is incapable of being applied to oral pleadings. It is only those subscribed by the party, that are to be verified; and the oath of a party to his verbal declaration or answer, would be idle in the extreme.

We think there was no error in the summons or proceedings in the court below; and it is unnecessary to inquire how far the defendant waived the supposed errors, by pleading and going to trial.

On the merits, we must direct a new trial, without costs to either party, in this court.

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Quick v. Keeler.

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## QUICK v. KEELER.(a)

A judgment creditor whose execution was issued and returned unsatisfied before the code of procedure, may, without first obtaining leave of the court in which the judgment was recovered, proceed against his debtor by a complaint in the nature of a creditor's bill.

The rules of court requiring certain allegations to be contained in a creditor's bill, are superseded by the code which declares what shall be stated in the complaint. If the plaintiff comply therewith, and set forth the matters which by the revised statutes were a pre-requisite to the filing of the bill, it is sufficient.

Dec. 4; Dec. 9, 1848.

DEMURRER to a complaint, in the nature of a bill under the former practice, by a judgment and execution creditor, to reach the debtor's equitable interests, things in action, and effects. The defendant demurred to the complaint on the grounds, 1. That the court had no jurisdiction, it being an action on a judgment, brought without leave of the court. 2. The complaint does not state that the plaintiff knows or has reason to believe, the defendant has equitable interests, &c., of the value of \$100 and more, exclusive of all prior just claims thereon, which the plaintiff has been unable to discover and reach by execution on such judgment. 3. The facts stated, are not sufficient to constitute a cause of action.

*F. Sayre*, for the defendant, cited sections 64, 343, 388, of the Code of Procedure; Commissioners of Practice Report, 1848, page 201; Laws of 1848, p. 566, § 2, subd. 2; Supreme Court Equity Rules, 131; 3 Paige, 505.

*W. C. Betts*, for the plaintiff.

SANDFORD, J.—This demurrer presents the question whether since the code of procedure went into effect, a judgment credi-

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(a) Before SANDFORD, J., at special term, decided after advisement with his associates.

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tor is at liberty to proceed by a complaint, in the nature of a creditor's bill, where his execution was issued and returned unsatisfied, before the code. All the justices of this court have acted upon the assumption, that the creditor may thus proceed; but in consequence of the formal argument in this case, I have consulted with my associates, and will now announce the conclusion in which we all concur.

The sixty-fourth section of the code is relied upon as cutting off the remedy sought by this suit. It provides that no action shall be brought upon a judgment rendered in any court of this state, between the same parties, without leave of the court, &c. The exceptions need not be noticed for my present purpose. This suit is undoubtedly an "action," within the definition of the code.

The substituted remedy for the former creditor's suit, which is found in chapter 2 of title 9 of the second part, is made applicable to executions thereafter issued on judgments and decrees recovered prior to the code, by the "Act to facilitate the determination of existing suits in the courts of this state." (Laws of 1848, ch. 380.) Whether the words "hereafter issued," in that act, mean after the first day of July, when the code took effect, or after the twelfth day of April, on which day the act became a law, we will not decide in this place, for the execution in this case was returned before either of those dates.

It is clear, that the new remedy provided by the code, does not reach the case; and the plaintiff must proceed by a complaint similar to a creditor's bill as formerly in vogue, or his remedy founded upon the return of his execution is gone.

We find that the 388th section, which repeals all statutory provisions inconsistent with the code, expressly enacts, that all rights of action given or secured by existing laws, may be prosecuted in the manner provided by the code. A right of action is to be enforced by an action; and this with the express application of the substituted remedy to executions issued after the act of April 12th, before referred to, became operative, satisfactorily shows, that the judgment creditor whose execution was issued and returned before that period, cannot avail himself of the summary proceeding so substituted.

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Quick v. Keeler.

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By the law existing at the passage of the code, the plaintiff in this case had a perfect right of action against the defendant, founded upon his judgment, his execution, and the return of the latter unsatisfied. This right was conferred by statute, and was to be enforced by a bill in equity. (2 R. S. 173, § 38, &c.) It was preserved by section 388 of the code, with the modification that it must be prosecuted in the manner therein provided. That is, instead of a creditor's bill, the plaintiff was required to proceed by a complaint, and to conform his suit to the forms prescribed by the code. The section abolishing actions of discovery in aid of other actions, (§ 343,) does not affect the point. A discovery was one of the features of a creditor's suit, as it was of most suits in equity; but it was an incident and not the chief end of the suit.

The rules of court requiring certain allegations to be inserted in a creditor's bill, are superseded by the code which declares what shall be stated in the complaint. It suffices, if the plaintiff comply with the code, and also set forth all that by the revised statutes was made requisite to the filing of a creditor's bill.

As to the want of an allegation, that the defendant has equitable interests or property to the value of one hundred dollars and more; this was one of the requirements of the rules of the court of chancery and supreme court in equity. It is not necessary to be alleged. What may be the result, if the plaintiff fail to establish that the defendant has property to the amount of seventy-five dollars, (Laws of 1847, ch. 470, § 21, and ch. 280, § 31,) it will be time enough to consider when the question arises.

The statement of the execution is sufficient.

Judgment for plaintiff on the demurrer.

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Jones v. Cowman.

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## JONES v. COWMAN.

Where in a conveyance of city lots, the premises were described as being bounded by exact measurement of feet and inches, then on two sides by the side of two several streets laid out and opened, and then "*southerly by the northerly line or side of T. B.'s lane;*" and the deed also described the premises as lot 21 on a map referred to, and as bounded by two other lots on that map, and the map contained those and a large number of city lots, exactly protracted by metes and bounds, excluding the streets and lane; *Held*, that the description limited the grantee to the northerly side of the lane, and did not carry him to the centre thereof.

In a deed, bounding the grantee by a lane, there was added in the description of the premises, "Together with the use and privilege of the said lane, until the Mayor, Aldermen and Commonalty of the city of New York, shall cause streets to be opened running through or adjoining the said piece or parcel of land hereby granted;" *Held*, that the latter words were evidence of an intention on the part of the grantor, to exclude the lane from the principal grant. Per VANDERPOEL, J.

In an action of ejectment, the inquiry respecting the plaintiff's title must be confined to the question what was conveyed to him by his immediate grantor, not what ought to have been conveyed to a remote source of the plaintiff's title.

In ejectment, the plaintiff can only recover on the strength of his own legal title.

Nov. 20; Dec. 23, 1848.

THIS was an action of ejectment brought to recover the possession of certain premises in the 16th ward of the city of New York, being the northerly part of a certain strip of land formerly known as Burling's Lane. The cause was tried before Chief Justice OAKLEY, in May, 1848.

On the trial of the cause, it appeared in evidence that the defendant was in possession of the premises in question. The plaintiff's counsel then read in evidence a conveyance from Thomas Burling and wife, and Samuel Burling and wife, to Benjamin F. Haskins, which deed was dated April 23d, 1806, and was duly acknowledged and recorded, and conveyed "all that certain piece or parcel of land, situate, lying and being in the 16th ward of the city of New York, bounded westerly by land late of John Thornton, northerly partly by land of James R. Smith, and partly by land belonging to Isaac Varian, easterly by land now in the possession of the said Benjamin F. Haskins,



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*and southerly by a lane 20 feet in width, belonging to the said Thomas Burling and Samuel Burling, leading to the Bowery Road, containing twenty-nine lots of land of 25 feet by 100 each, be the same more or less; together with the use and privilege of the said lane, until the Mayor, Aldermen and Commonalty of the city of New York, shall cause streets to be opened," &c.* The plaintiff's counsel then read in evidence, a mortgage executed by Haskin and wife to Thomas Burling and Samuel Burling, upon the same premises, to secure a part of the purchase money; also, an assignment of the said mortgage from the mortgagee to Thomas Nixon, dated June 23d, 1807, duly acknowledged and recorded. The plaintiff's counsel then read in evidence a bill of foreclosure of the mortgage, filed by the executor of the assignee of the said mortgage, under which a decree was obtained May 21, 1842, and the premises sold under the direction of Thomas Addis Emmet, master in chancery. Upon the sale, the master conveyed by deed, dated July 9, 1832, to Alfred Lowe, "all that certain lot, piece, or parcel of land, situate, lying, and being in the 12th ward of the said city of New York, and known and distinguished on a map of land in the 12th ward of the city of New York, under mortgage to the estate of Thomas Nixon, deceased, dated New York, February 1, 1831, drawn by Geo. B. Smith, city surveyor, as lot No. 21, bounded and contained as follows: northwesterly, in front by the southeasterly line or side of the Fifth Avenue, 23 feet. Northeasterly, by lot No. 22, on said map, 100 feet. Southeasterly, in the rear by lot No. 25, on said map, 14 feet, 3 inches. Southerly, *by the northerly line or side of Thomas Burling's lane*, 36 feet, 9 inches. And southwesterly, by the northeasterly line or side of Seventeenth street, 64 feet, 2 inches; as by said map will more fully appear." Next, a deed from Alfred Lowe and Sarah his wife, to Henderson P. Lowe, dated March 27, 1834, duly acknowledged and recorded, and conveying the same premises by the same description. Next, a deed from Henderson P. Lowe and Mary his wife, to Benjamin F. Howe, dated Nov. 11, 1834, duly acknowledged and recorded, conveying the same premises by the same description. Next, a deed from Benjamin F. Howe and wife, to Robert Steele, dated June 29,

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Jones v. Cowman.

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1835, conveying the same premises by the same description. Next, a deed from Robert Steele and wife, to Isaac Brown, dated October 20, 1845, duly acknowledged and recorded, conveying the same premises, and also lot No. 22, with a similar description, and in which the southerly bound is described as being *by the northerly line or side of Thomas Burling's lane, &c.* Next, a deed from Isaac Brown and wife, to the plaintiff, dated May 5, 1836, conveying the same premises by the same description as in the deed to Isaac Brown, and in the deed of Thomas Addis Emmet to Alfred Lowe. The map of the premises, referred to in the master's deed, was then produced in evidence. This map exhibited the premises, and lots Nos. 22 and 25 referred to in the deed, as laid out in precise measure of feet and inches, not including any part of Burling's lane, nor any part of Fifth Avenue or Seventeenth street, which were proved to have been opened. The map contained a great number of lots, all protracted and bounded in the same manner.

The plaintiffs then called John Randall, who testified that he laid out and surveyed the streets and avenues as laid out by the commissioners, under the act of April, 1807. The counsel then offered to prove, that for more than twenty years previous to the opening of Seventeenth street, and the streets adjacent, Burling's lane, as laid down on the map, was an open, public, and travelled road or highway; to which testimony the defendant's counsel objected. The court excluded the testimony, and the plaintiff excepted.

The court charged, that whether the road or lane called Burling's lane was a public, travelled road, was immaterial under the construction which should be given to the deed. That by those deeds, the plaintiff was bounded by the northerly side or line of Burling's lane, and therefore was not entitled to any of the land included within the boundaries of the lane. The plaintiff excepted to the charge. The jury found a verdict for the defendant.

*H. E. Davies, and W. Kent, for the plaintiff.*

*D. Lord, for the defendant.*

BY THE COURT. VANDERPOEL, J.—The only question is, whether the conveyances under which the plaintiff claims, carried the grantees in those deeds to the centre of Burling's Lane. In the deed from Mr. Emmet, the master in chancery, to Alfred Lowe, of the 19th of June, 1832, the premises are described as being bounded southerly by *the northerly line or side of Thomas Burling's lane*. If these words in connection with the description, carry the grantee to the centre of the lane, the plaintiff is entitled to recover. If they confine him to the northerly side of the lane, he must fail in the suit. In *Hammond v. McLachlan*, (1 Sandf. Rep. 323,) and in *Herring v. Fisher*, (ibid. 344,) we took occasion very fully to consider the rule of construction, as to the extent to which a grant of land bounded on a road or creek, carries the grantee, in respect to the adjacent ground within the road or creek. In the former case, we fully recognized the principle held in *Jackson v. Hathaway*, (15 John. 447,) that when land is bounded *along a road, or upon a road, or running to a road*, the grantee takes to the middle of the road, but where the description is expressly limited *to the bank of a river*, or where it runs *ALONG the side of a road*, the grant must be held to be restricted, and not to include the land to the centre of the road or of the stream. And see *Child v. Starr*, (4 Hill, 369.) We also held, that this rule of construction applies equally to city lots and to farms in the country. In some of the reported cases of applications to the supreme court to confirm assessments, it is intimated, that in respect to this rule of construction, there is or may be a difference between city lots and country farms; but we expressly repudiated such a distinction. According to the cases cited, the words in the master's deed "*southerly by the northerly line or side of Thomas Burling's lane*," (taken in connection with the exact metes given in the deed, and the map under which the master sold, which excludes the lane,) must be deemed to be exclusive of that portion of the lane for which this suit is brought, and limited the grantee to the northerly side of the lane.

The plaintiff, however, contends, that the deed from the Burlings to Haskin, bearing date the 23d April, 1806, is full enough to convey half of the lane to the grantee. Haskin was

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the mortgagor in the mortgage which was foreclosed, and under which, after it was prosecuted to a decree of sale, the master made the sale. If this were so, it by no means follows, that the title of the plaintiff is commensurate with that of Haskin, the grantee in that deed, and who executed the mortgage. The plaintiff makes title under the master's deed; and if the master did not sell or convey to him all the premises described in the mortgage, it is not competent for the plaintiff to say that the grantee in the master's deed took a title to all the lands described in the mortgage on which the decree of sale was entered. If the description in the master's deed is not full enough, or if the deed is erroneous in any other respect, this is not the place or the occasion to reform it. The plaintiff prosecutes in a court of law, on the strength of his more legal title, and if the conveyance under which he claims, excludes the premises in suit, this difficulty is not answered by the allegation, that it ought to have contained it. So also, the deed from Brown and wife to the plaintiff, of the 5th of May, 1836, follows the description in the master's deed. It bounds the plaintiff "*southerly by the northerly side or line of Thomas Burling's lane,*" referring to the map, &c., and excludes the premises in question. All the conveyances from the date of the master's deed to Lowe, in 1832, to the date of the deed from Brown to the plaintiff, (being four in number,) follow the description of the master's deed, and according to our construction exclude the northerly half of the lane. The plaintiff cannot, we repeat, remedy the exclusion by the position, that the master's deed *ought* to have included the premises. We must confine ourselves to the inquiry, what was conveyed to the plaintiff by his immediate grantor, not what ought to have been conveyed to a remote source of the plaintiff's title. The plaintiff can only recover on the strength of his own legal title.

But if the description in the deed to Haskin of the 23d of April, 1806, were available to the plaintiff, notwithstanding the excluding character of the subsequent conveyance, then another difficulty would spring up in the plaintiff's way. This deed, to be sure, bounds 'southerly *by* the Burling lane,' but those further words are added, "*together with the use and privilege of the*

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said lane, until the mayor, aldermen, and commonalty of the city of New York, shall cause streets to be opened running through or adjoining the said piece or parcel of land hereby granted." The latter words show pretty conclusively, that it was the intention of the grantor to exclude the lane from the principal grant. A party cannot convey land in fee, and *the mere use* of other land, without excluding the latter from the principal grant. The contingency, too, contemplated by the grant has happened. Fifth avenue and seventeenth street have been opened.

We are of opinion that the plaintiff did not make out a good title to any part of the lane, and that the motion for a new trial must be denied.

We have treated the case as if the lane in question were a public road or highway, which was certainly a mode of considering it most favorable to the plaintiff. We think the case is against him, on the assumption that the lane was a highway, and have not therefore deemed it necessary to consider the point taken by the defendant, that this lane was a mere private way, and that, therefore, ~~on no principle of construction, could the grant be held to extend beyond the northerly side of it.~~

Motion for new trial denied.

H. F. and L. SEYMOUR v. DAVIS.(a)

A contract to sell and deliver cider at a future time, which the seller is to procure from farmers and refine to fit it for market, is a contract for the sale of goods; and if by parol, is within the statute of frauds.

Where a parol contract was made for the delivery of five hundred barrels of cider, in parcels at future periods, each to be paid for in a note on delivery, and seve-

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(a) The Chief Justice did not hear the argument in this case, but he was present at the deliberations of his associates, and fully concurred in the points decided.

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ral parcels were delivered from time to time, and all paid for except the last ; in an action for the last, it was *held*,

1. That the delivery and acceptance of each parcel, made a several and distinct contract of sale of such parcel ; upon each of which successively, each party had all the actions and remedies incident to a sale. Each shipment must be regarded as a sale by itself of the quantity accepted, independent of the original void agreement.
2. That the shipments and deliveries so made, though in consequence of the void agreement, cannot be regarded as one transaction, so as to entitle the buyer to recoup against the price of the parcel last received, his damages by reason of defects in the previous parcels.
3. The part performance of a void contract for the sale of goods, does not take it out of the statute of frauds, even in respect of the portion performed. Acts of delivery and acceptance under such a contract, establish a new contract of sale, in which more or less of the terms of the void agreement may be expressly or impliedly embodied ; but each delivery and acceptance make a distinct contract.

Nov. 8, 9 ; Dec. 16, 1848.

**ASSUMPSIT** for the price of one hundred barrels of cider, delivered by the plaintiff to the defendant, on or about March 25th, 1847. At the trial before SANDFORD, J. in April last, the plaintiffs, who resided at Hartford, Connecticut, proved the delivery of the cider to the defendant in New York, and that the latter was to pay four dollars per barrel, in a note at sixty days.

The defendant then proved, that in November, 1846, a verbal agreement was made between him and the plaintiffs, by which they agreed to deliver to him in New York from five to eight hundred barrels of cider, during the fall and spring following, of the best quality, in chestnut barrels, at such times, and in such quantities or shipments as the plaintiffs could make it convenient to send, for which the defendant agreed to pay four dollars per barrel, by remitting to the plaintiffs his indorsed note at sixty days for the amount of each shipment, as the same should be received by him. The business of the plaintiffs, at the time of these transactions, was buying cider of farmers who made it, and refining and selling it. They delivered several parcels of cider to the defendant, after making the agreement, and prior to the delivery of that in question, for each of which he gave the indorsed note stipulated in the agreement.

The quantity of no one of these previous deliveries was

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shown, nor the aggregate quantity. The notice attached to the defendant's plea, claimed that 280 barrels in all had been delivered under the contract.

The defendant offered evidence to prove that part of the cider delivered before the receipt of the hundred barrels in question, turned out to be a bad article, becoming thick and milky, and having a bad smell; and that he could not sell a part of it by reason of such defect of quality, and lost the price of other parts of it which he had sold. The defendant claimed to recoup his damages sustained by reason of the bad cider so delivered to him prior to March, by having the same deducted from or applied to extinguish the price of the one hundred barrels in question. The plaintiffs objected to the evidence, and the judge excluded it.

The defendant then gave evidence to show that the hundred barrels was in part defective, and that he sustained damages thereby. The judge instructed the jury that the plaintiffs were entitled to recover the actual value of the one hundred barrels of cider at the time it was delivered. The jury rendered a verdict for the plaintiffs for \$316 50—the defendant moves for a new trial on a bill of exceptions.

*C. D. and C. Lawton*, for the defendant.

*J. H. Raymond*, for the plaintiffs.

BY THE COURT. SANDFORD, J.—The defendant makes a point that the cider contracted to be delivered, was not susceptible of delivery at the time the contract was made, but was to be bought of farmers by the plaintiffs, and prepared for market by refining it, &c., and therefore the agreement was one for work and labor, and not within the statute of frauds.

The law is perfectly well settled, both here and in England, that this was a contract for the sale of goods. (*Downs v. Ross*, 23 Wend. 270; *Garbutt v. Watson*, 5 B. & Ald. 613.) There is no doubt that the agreement in question was void by the statute.

It was proved that the plaintiffs proceeded to make deliveries



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of cider at several different times between November and April, all of which were paid for as delivered, except the hundred barrels for which this suit was brought, and which were delivered in March or early in April. There is no evidence showing what quantity was delivered on the several occasions prior to the last; but it was not pretended that the entire quantity received by the defendant was equal to the smallest quantity specified in the contract of sale. The notice attached to the defendant's plea, states that 280 barrels were delivered in the whole, and the proof falling short of establishing that quantity, it is safe to assume that not more than half of the smallest quantity contracted for, was ever forwarded by the plaintiffs. On the proof given, the defendant contends, first, that the delivery and acceptance of these several lots or portions of the cider, took the contract out of the statute. Second, that whether originally void or not, it has been performed by both parties without objection, and neither party can now avail himself of the statute to avoid any liability he may have incurred in that performance. Third, that the whole should be regarded as one transaction, growing out of one contract, and any loss or damage the defendant may have sustained by defects in any part of the cider in any of the lots delivered, ought to be allowed to him by way of recoupment against the price of the same, or any other of the lots or parcels.

1. As to the defendant's first proposition. It is true that where an order for goods, or a contract for the sale of goods, embraces several distinct lots or parcels, and a part of the goods is delivered and accepted *at the time of the sale*, the contract is not within the statute. What will be deemed a cotemporary delivery, it is foreign to our present purpose to inquire. Whenever the question has been presented on such a contract, the effort has been to establish that there were separate and distinct sales of the respective parcels. If the court ascertained that it was a single sale, though consisting of several articles, it has been uniformly held that the statute did not apply where a part had been received and accepted. This was the ground of the decision in the most recent, as well as the strongest case we have seen. (*Scott v. The Eastern Counties Railway Company*



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12 Mees. & W. 33.) There the contract was for lamps, one of which, a very large and peculiar lamp for a junction, was to be manufactured, and required a long time for its completion. All the others were delivered at or about the time of the contract. The acceptance of those, was held to satisfy the statute of frauds, as well as the statute 9 Geo. IV., c. 14, s. 7, extending its provisions to contracts for goods subsequently to be made, because the whole formed one entire contract.

The case of *Vincent v. Germond*, (11 Johns. 283,) cited by the defendant, does not decide that the acceptance of a part, *after the making of the contract*, will relieve it from the operation of the statute. It was decided, that there was a sufficient delivery to take the case out of the statute, meaning at the time of the sale. This is apparent from a careful examination of the case, which was submitted without argument, and is very briefly stated by the reporter. When the sale was made, the four oxen were in the plaintiff's clover field, and he said he had had one or two injured by feeding there. The defendant said he would take them at his own risk, and they must remain where they were till he completed his drove, when he would take them away. A short time after, he came and took away three of them, without saying any thing to the plaintiff. The fourth had died in the mean time, from eating clover. The court said, the taking them in this mode, with what occurred at the sale, warranted the inference of a delivery. That the defendant dealt with the oxen as his own, and as if in his actual possession, in virtue of the original contract and transfer of the property.

We can find no authority for saying, that a parol agreement to deliver goods at a future time, becomes valid as to the whole by the delivery of a portion at, or subsequent to, such time. It is stated in one approved treatise, as the result of the decisions in England, that where the contract is to deliver goods in parts or parcels, at different intervals, at a certain price for each part; although the contract may be void for want of writing, as regards the executory part of it, yet the prices of the parts actually received, are recoverable under a count for goods sold. (Chitty on Cont. 396.) We will not stop to inquire how far

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this is correct as to the price, or whether the recovery must not be on a *quantum meruit*. We need only say, that no authority goes further than this, and this does not go far enough to sustain the defendant's position.

In *Mavor v. Pyne*, (3 Bing. 285,) where the agreement was for an illustrated publication, to be issued in twenty-four monthly numbers, at a guinea a number, and was void by the statute; it was held, the publisher could recover for the numbers actually delivered. The court said, he could not recover on the original contract, but he was entitled to be paid for the numbers received by the defendant. That the parties meant each number was to be paid for as it came out, and the subscription was to be considered as a divisible contract.

Chief Baron Hale, in 1662, held, that several deliveries, made under an entire agreement, if severally accepted, made so many several contracts. (*Barker v. Sutton*, 1 Campb. N. P. 55, note. And see to the same effect, *Banker v. Hoyt*, 18 Pick. 555.)

Recurring to the agreement before us, it was for the delivery of from five to eight hundred barrels of cider, during the ensuing five or six months, in such quantities or shipments as the sellers might find convenient, at the price of four dollars per barrel, to be paid for each shipment when received, in an indorsed note at sixty days. There was no written evidence of the contract, nor payment of any part of the price. There was no acceptance or receipt of the goods by the buyer; and by its stipulations, there was to be no delivery of any of them until an undefined future period.

Now the statute declares such a contract to be absolutely void. It was undeniably void when it was made, and for the month or two intervening between that time and the first delivery of the cider. Did the acceptance of that first parcel, breathe into this void contract the breath of life, and make it valid for the whole quantity of goods embraced in it?

We cannot so regard the effect of such a partial delivery. We think the contract, if void when it is made, can never become a valid agreement. Subsequent acts may establish a new contract of sale between the parties, either express or implied, and embodying more or less of the terms of the original ar-



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remedy as upon a valid sale and purchase of the quantity contained in such shipment. Neither party could set up the statute of frauds to defeat or impair the remedy of the other for or upon such shipment, for the plain reason, that the statute had nothing to do with it. It was simply a sale of so much cider, delivered and accepted at the time. But we cannot assent to the proposition intended by the defendant in his point, that because the contract, though void, has been performed in part, to the extent of such performance, it is to be deemed an entire, single, and valid contract, upon the terms stipulated in November, for all the cider delivered between November and May. This would be doing violence to the statute of frauds, and the reasons we have given show, that it cannot be maintained as law. Each shipment must be regarded as a sale by itself of the quantity accepted, independent of the previous void contract.

3. The defendant's third proposition, that the whole of the shipments should be regarded as one transaction, growing out of one contract, is inadmissible, upon the same grounds which we have stated in examining the previous points. The one contract relied upon to bring all these shipments together was void, and therefore was no contract, and each must stand or fall by itself. As they were distinct sales, they cannot be regarded as one transaction, so as to entitle the defendant, in a suit for the price of the last parcel delivered, to have allowed to him his damages growing out of any of the previous deliveries. The defendant does not ask to set off these damages; and the doctrine of recoupment is limited to damages arising from, or growing out of, the contract upon which the action is brought. (*Cram v. Dresser*, Sept. 30th, 1848.)(a)

This disposes of the principal questions raised at the trial. The objections to the judge's charge are untenable. There was no disputed fact, in respect of the delivery of the cider; and whether the last was a separate transaction or not, was a question of law, and as such it has been argued and considered. As to the instruction relative to the offer to return the cider last delivered, it was entirely correct. The offer referred to by the

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(a) *Ante*, page 120.



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by S. H. Mann, cashier of the Canal Bank, upon the American Exchange Bank of New York, payable to the order of E. S. Moore. On the 15th of September, 1847, the draft was brought to the bank of Rutland, Vermont, by a person who was introduced to the cashier as E. S. Moore, and who, it was stated, wished to obtain from the bank the money on a draft he had, for the purpose of buying cattle. The cashier having agreed to cash the draft, Moore indorsed the same, and received the amount thereof in bills of the bank. The next day the draft was sent to the Farmers Bank of Troy, to be collected for the bank of Rutland, who remained the owners thereof until it was taken up by the plaintiffs. The Farmers Bank of Troy transmitted the draft, with their indorsement thereon, to the defendants, the Merchants Bank, in New York, who were the agents of the Farmers Bank in that city, for collection. The defendants presented the draft to the drawees, the American Exchange Bank, and payment being refused, for the want of funds of the drawers, it was in the usual course of business handed to John D. Campbell, a notary public, for protest. The draft was again presented to the drawees by the notary, on the 18th of September, 1847, and payment being refused, it was duly protested, and notices to the endorsers and drawer were prepared to be sent by mail. The plaintiffs hearing of the protest of the draft, and supposing such draft to be genuine, thereupon intervened, and for the honor of the drawers, of whom they were then the bankers or agents, in New York, voluntarily paid to the defendants the amount of the draft, with costs of protest. And the defendants passed the amount to the credit of the Farmers Bank of Troy. It afterwards appeared, and was proved on the trial, that the draft was forged. The circumstances under which the draft was paid to the plaintiffs were as follows :

ELIJAH H. RIKER testified, that on the 20th of Sept, 1847, he was in the office of the notary, John D. Campbell ; that he answered calls for him when he was absent ; that on that day, Mr. Goddard, one of the plaintiffs, called at Mr. Campbell's office and inquired for Mr. Campbell. He said he had been informed by a clerk in the American Exchange Bank, that Mr.

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Campbell had an Ohio draft in his hands, drawn by the Canal Bank of Cleveland, to protest as a notary; and that he, Mr. Goddard, wished to pay it, with the fees of protest; that the witness requested him to wait a few minutes until Mr. Campbell should come in; that Mr. G. said he was in haste, and could not wait; and asked the witness if he would take a certified check and hand it to Mr. Campbell. He asked for the draft, and said he wanted to pay it, and had a certified check to pay it with. The witness told him that Mr. Campbell had the draft. He then asked the witness to take the certified check, for the purpose of paying the draft in the hands of Mr. Campbell, which he did. Mr. Goddard said he was the agent of the bank, and did not wish any notice of protest sent out. When he was leaving, he requested that the draft should be sent down to their office. When Mr. Campbell came into the office, the witness handed him the check, and stated to him that Mr. Goddard had called to pay a draft of the Ohio Bank, and that no notices of protest should be sent; also, that the plaintiffs wished the draft sent down to their office.

John D. Campbell, the notary, testified, that on the 18th of September, 1847, being Saturday, he presented the draft at the American Exchange Bank, and demanded payment, which was refused; that on Monday morning, September 20th, when he came down to his office, he found a certified check of the plaintiffs for \$1000 75, which he was told by Mr. Riker had been left to pay the draft; that he took the check to the Merchants Bank and handed it to the note teller, who certified the amount to the Farmers Bank at Troy. That he brought back to his office the draft, and put it in his trunk, where it remained until the next morning, when Mr. Goddard called and spoke of his having left his check, to pay the draft; that the witness then went to his trunk and took out the draft and handed it to him. On looking at it a few moments, Mr. Goddard said he doubted if it was a genuine draft; and wanted the witness to return him the money. The witness told him that he had presented it to the bank on which it was drawn, and that he thought it strange nothing had been said about its being a forgery; the witness offered to go to the bank with him, and see

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the cashier; that he told Mr. G. that if he had informed the witness of the forgery the day before, he, the witness, might have sent the notices in time on that day. Mr. G. said he had not seen the draft until it was shown to him by the witness. The witness went to the Merchants Bank with Mr. G. and saw the cashier with him. Mr. G. told the cashier that the draft was a forgery, and demanded back the money deposited the day before. The cashier declined refunding it, saying that he did not know the draft was a forgery, and that the money having been paid, and gone to the credit of the Farmers Bank of Troy, he did not see how it could be returned. It was then agreed between Mr. Goddard and the cashier, that the witness should again present anew, and protest the draft, and give notice to the parties, which he did, on the 21st of September. This witness also testified that Mr. Riker was not his clerk; that when he was absent from his office, Riker frequently received papers for him, and answered questions for him in regard to the witness's business; that Riker had equal charge of the office, being a co-tenant with the witness of the same.

The testimony being closed, by consent of parties, the jury found a verdict for the plaintiffs for \$1051 53, subject to the opinion of the court.

*H. E. Davis*, and *W. Kent*, for the plaintiffs.

I. Money paid under a mistake of facts can be recovered back in an action for money had and received. (*Boyer v. Pack*, 2 Denio R. 107; *Mowatt v. Wright*, 1 Wend. 355; *Wait v. Leggett*, 8 Cow. 195; *Bank of Orleans v. Smith*, 3 Hill, 560.)

II. The act of the plaintiffs in paying supra protest, is sanctioned and encouraged by the commercial law. (Story on Bills of Exchange, § 121, 122, 123.) And in thus paying, the plaintiffs acted not only under a mistake, but upon an affirmation of the defendants' agent, untrue in point of fact, and which the plaintiffs had no means of correcting.

III. Had the plaintiffs even seen the draft and paid the money under a mistake as to the genuineness of the drawer's signature, he would have been entitled to recover back his money,



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on the discovery of the mistake and giving notice. (*Wilkinson v. Johnson*, 3 Barn. & Cres. 428; *Canal Bank v. Bank of Albany*, 1 Hill, 287.)

IV. Due diligence was used by the plaintiffs in giving notice of the forgery. (See the same cases as mentioned in last point.)

*B. W. Bonney*, for the defendants.

I. The Bank of Rutland were bona fide holders for full value, of the check in question, which was received by that bank, and the consideration therefor paid in the ordinary course of business, without negligence, fault, or blame on their part.

II. The check was, in the usual course of business, indorsed and transmitted for collection by the Bank of Rutland to the Farmers Bank of Troy, and by that bank to the Merchants Bank in New York. The defendants were the agents of the Farmers Bank in the transaction, having no interest whatever in the check or its proceeds.

III. The check was promptly presented for payment by the defendants, and payment being refused, it was, in the usual course of business, handed to a notary for protest, by whom the same was again presented to the drawees and duly protested, and notices to the indorsers and drawer prepared to be sent in due course of mail, as required by law. No laches, improper conduct, or blame whatever is attributable to the Merchants Bank or the notary.

IV. The plaintiffs, of their own mere motion, without request, application or notice from the defendants or the notary, intervened, and for the honor of the drawers, of whom they were then the bankers or agents in New York, voluntarily paid the check. The defendants received the money in perfect good faith, and passed the same to the credit of their principals, the Farmers Bank, and cannot be required to repay the same to the plaintiffs.

V. The payment of the check, without request or notice from the defendants, and without seeing the same, to determine as to its genuineness or character, was gross negligence on the part of the plaintiffs, which precludes them from recovering back the money so paid. If they were misled by information received

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from the drawees, the defendants cannot be made responsible for it.

• VI. It is a well settled principle of law, that the drawee of a bill or check, who accepts or pays the same, thereby admits the signature of the drawer, and is estopped from subsequently denying it, and cannot afterwards defend an action on the acceptance, brought by a bona fide holder, or recover back the money paid, although the drawer's signature be a forgery. And a third person not a party to the paper, who for the honor of the drawer, has voluntarily intervened and accepted or paid the bill or check, is, under like circumstances, in no better position than the drawee. (Chitty on Bills, Springfield Ed. of 1842, 307, 426-7, and 430-1; *Price v. Neal*, 3 Bur. 1354, A. D. 1762; *Smith v. Chester*, 1 Term R. 654, A. D. 1787; *Levy v. Bank of U. S.*, 1 Binney, 27; *Jones v. Ryde*, 5 Taunton, 488; *Bruce v. Bruce*, 5 Taunton, 495; *Smith v. Mercer*, 6 Taunton, 76; *Bass v. Clive*, 4 M. & S. 15, A. D. 1815; *Wilkinson v. Johnson*, 3 Barn. & Cress. 428; *Cock v. Masterman*, 9 Barn. & Cress. 902.)

VII. It was the duty of the Merchants Bank, as correspondent and agent of the Farmers Bank, to have caused the check in question to be duly protested on the day it was presented to the drawees, and notices to be regularly sent to the indorsers and drawer. And not having done so, the Merchants Bank is responsible to the Farmers Bank for the amount of the check. The responsibility of an agent is in these particulars, greater and more rigidly enforced than that of a party in interest as indorser for value. (*Allen v. Suydam & Boyd*, 20 Wend. 321; *Woodruff v. Merchants Bank*, 25 Wend. 673; *Same case in error*, 6 Hill, 174.)

VIII. The plaintiffs, by intervening and voluntarily paying the check in question, and by application to the notary, prevented the giving of due notice to the endorsers and drawers, and procured the protest and notices which had been prepared to be destroyed. By these acts the defendants have been made liable to the Farmers Bank for the amount of the check, and therefore the plaintiffs cannot recover back the money so paid.

IX. The testimony shows actual damage to the Bank of Rut-

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land, by the delay in sending forward the protest and notices. Had they been sent one day sooner, the supposed forger would have been arrested at Cleveland, and the money might have been recovered from him.

X. The money in question having been received by the defendants as mere agents, and immediately passed to the credit of the Farmers Bank, their principal, the Farmers Bank and not the defendants, (if any one,) were liable therefor; and this action against the defendants cannot be sustained.

XI. The verdict, taken by consent, should be set aside, and a non-suit or verdict for defendants entered.

BY THE COURT. VANDERPOEL, J. —It is now too well established to admit of doubt or controversy, that money paid under a mistake of facts, can be recovered back, in an action for money had and received. (*Boyer v. Pack*, 2 Denio, 107; *Mowatt v. Wright*, 1 Wend. 355; *Bank of Orleans v. Smith*, 3 Hill, 560.) It is conceded that the draft which the plaintiffs paid to the defendants, was a forgery; and the only question is, upon whom the loss should fall. Questions of this description are not always free from difficulty; as the decisions of the courts, especially those in England, have not always been consistent as to payment by mistake of bills or notes, when there has been a forgery. Chitty says, (Chitty on Bills 430, ed. of 1842,) that with respect to payments by mistake, of bills or notes, where there has been a forgery, the decisions and opinions have been contradictory; that there are many conflicting decisions upon the question, whether the party paying should be allowed to recover back the money from the person to whom he has inadvertently paid it. In stating the prominent reasons that have been put forth on both sides of this question, he remarks, that the holder of a bill who has obtained payment, cannot be considered as having altogether shown sufficient circumspection—"he might, before he discounted, or received the instrument in payment, have made more inquiries as to the signature and genuineness of the instrument, even of the drawers or indorsers thereof; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he

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should profit by this accidental payment, when the loss had already attached upon himself, and when, by an immediate notice of the forgery, he is enabled to proceed against all other parties, precisely the same as if the payment had not been made, and, consequently, the payment to him has not, in the least, altered his situation, or occasioned any delay or prejudice ; that of late, these considerations have influenced courts in determining whether or not the money shall be recoverable back."

These views of the learned writer strike us as sound, and the considerations which he states as having, of late, influenced courts, we are free to say, have had a potent, if not controlling influence in bringing us to the conclusion we have reached in this cause. The defendants here were the agents of the Bank of Troy, and as such received the amount of the draft from the plaintiffs. They gave their principal credit on their books for the amount, but had not paid over the money. An agent's merely passing money in account, giving credit, or making a rest, is not equivalent to a *payment over*. (*Buller v. Harrison*, Cowper, 568 ; *Cox v. Prentice*, 3 M. & Sel. 344 ; 5 Taunt. 456 ; Ibid. 815 ; *Langley v. Warner*, 1 Sand. R. 209.) Enough appears to show that the Bank of Troy was the agent of the Bank of Rutland to collect, and the question, therefore, in reality, is, whether the Bank of Rutland, whose first mistake gave currency to this bill, shall sustain the loss, or the plaintiffs, who paid the bill for the honor of the Canal Bank of Cleveland.

The act of the plaintiffs in paying the bill, *supra protest*, is sanctioned by the commercial law. (Story on Bills, § 121, 122, 123.) The party who accepts and pays a bill, *supra protest*, has his own rights and recourse over against the person or persons for whose honor he accepted the same, and against all other parties to the bill, who are liable to the same person or persons. (Story, § 124.) He is not, then, to be regarded as a mere volunteer, who has officiously obtruded himself into the position he occupies, and who is therefore to be regarded with disfavor by the court.

The defendants had handed the bill to Mr. Campbell, their notary, after the drawees had refused payment for want of funds. On the 20th of September, one of the plaintiffs called at Mr.

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Campbell's office, and found Mr. Riker there, who, as he testifies, in Mr. Campbell's absence, answered questions and did business for him. He answered the plaintiff, on inquiry made by the latter, that Mr. Campbell had a draft of \$1000 of the Canal Bank of Cleveland on the American Exchange Bank, which the defendants had left with him, to be protested. Whereupon, the plaintiff handed to Mr. Riker his check for the amount of the draft and protest, to be delivered to Mr. Campbell, which he did so deliver to him on the same day, and the latter, on the same day, paid it over to the note-teller of the defendants, who credited it to the Bank of Troy. When the plaintiff paid it, he acted upon the representation of Riker, the agent of their notary, that the notary had such a draft, that is, a real draft, drawn by the Canal Bank of Cleveland on the American Exchange Bank. The payment was made on the faith of this representation when, in point of fact, it was not true. Ought the defendants to profit by such a payment, which, if not induced by the representations of their own agent, was accidental, and made in ignorance of a most material fact? More especially ought the defendants, to be exonerated from the obligation of refunding this payment, when they had notice of the mistake before they paid over the money to their principal, and before their situation, in respect to their principal, was in any respect changed. The case of *The Canal Bank v. Bank of Albany*, (1 Hill, 287,) was that of money paid on a forged indorsement of a draft. The court held that the defendants were bound to refund, on the ground that money paid by one party to another, through a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back. We are aware of the distinction between that case and the present, in the fact that there the name of the *indorser* was forged, and that in such a case the acceptor who pays in ignorance of the forgery, may recover back the money from an innocent holder, on the ground that he is not presumed to know the signature of every indorser. But when the name of the drawer is forged, the acceptor who pays the bill, will not, as a general rule, be allowed to dispute the genuineness of the drawer's signature. He is presumed to know the signature of the drawer when he

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accepts, as he is supposed to be in correspondence with him. In *Smith v. Chester*, (1 T. R. 655,) Buller J. says, when a bill is presented for acceptance, the acceptor looks to the hand-writing of the drawer, and he is precluded from afterwards disputing it; and that it is on that account that he is liable, though the bill be forged.

The plaintiffs here are not the acceptors. They did not look at the signature of the drawers when they made the payment, because they had not then the opportunity to do so. They gave their check to Riker before they saw the bill, and on the faith, induced by Riker's representations, that Campbell had a genuine bill drawn by the Canal Bank of Cleveland. Though the plaintiffs are not the drawees, yet had the American Exchange Bank, which was the drawee, paid the bill under the circumstances disclosed in this case, in respect to the plaintiffs, we cannot see upon what sound principles they could be precluded from recovering it back. Had the American Exchange Bank paid the bill to Riker without seeing it, on the representation of the latter that Campbell had such a bill; though standing in the relation of drawee, the bank thus paying would not come within the *reason* of the rule which precludes the drawee and acceptor from recovering back the money when the name of the drawer is forged. The American Exchange Bank would not have done, (because they could not when they made the payment,) what Justice Buller says every acceptor is presumed to have done, looked at the handwriting of the drawer to be satisfied that it is genuine. Suppose one of the officers of that bank had called upon the notary, and asked him whether he had such a bill, and the latter had answered in the affirmative, but that he could not then exhibit it, as the key of the desk containing it was in the possession of his clerk then out, and the officer of the bank had paid the bill on the faith of such representation, without seeing it, there is surely no sound principle of law or ethics, which would preclude the bank as drawee, in such a case, from questioning the genuineness of the drawer's signature, or recovering back the money. The reason which generally seals the mouths of the drawee and acceptor against denying the signature of the drawer, would not then have

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existed. Though the case of *The Canal Bank v. Bank of Albany*, is different from the present, in the particular above stated, yet the reasoning of the learned judge who delivered the opinion in that case, goes strongly to sustain the present plaintiffs. The learned judge also speaks rather disapprovingly of the case of *Cocks v. Masterman*, (9 Barn. & Cres. 902,) (a case much relied upon by the defendants,) and seems to intimate a doubt whether it ought to be followed. (1 Hill, 293.)

In *Cocks v. Masterman*, the court expressly waived an opinion upon the main question, whether the plaintiff there could have recovered back the money, if he had given seasonable notice of the forgery. The case turned entirely upon the ground, that notice of the forgery was not given by the plaintiff to the defendant on the same day the former discovered it. Judge Cowen, in the case of the Canal Bank, speaks of the rule adopted in *Cocks v. Masterman*, as one of "rigor."

The case of *Wilkinson v. Johnson*, (3 Barn. & Cres. 428,) seems rather to conflict with *Cocks v. Masterman*. In the former, the plaintiff paid the bill for the honor of one of the indorsers. It turned out, that the names of the drawer, acceptor, and the indorsers, for whose honor the plaintiff had paid the bill, were all forged; and it was held, that the plaintiff could recover back the money from the holder of the bill, to whom he had paid it under a mistaken opinion that the signature of the supposed drawer was genuine. The conclusion of the court, and the reasoning of Abbot, Ch. J., in that case, favor most of the positions taken by the plaintiffs here.

We also think, that due diligence was used by the plaintiff in giving notice of the forgery, and that no possible prejudice resulted or could result to the defendants, or to the Bank of Rutland, from the retention of the notice of protest for the period it was stayed at the plaintiff's request. They could not recover from the Canal Bank of Cleveland. The only person from whom they could recover was "*E. S. Moore*," the forger of the bill. It does not appear, that he had any residence where they could have sent notice to him, and it would hardly lie in his mouth to say, that he was not obliged to pay a forged draft, because he was not duly notified of its protest. (Story on Bills,



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§ 308.) We are of opinion, that the plaintiffs used due diligence. (1 Hill, 291, and cases there cited.)

The plaintiffs are entitled to judgment.

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## VANDEWATER v. THE CITY OF NEW YORK.

The provisions of the ordinances of the corporation of the city of New York, imposing penalties in respect of the using or obstructing the *public* wharves, docks, piers and slips, do not extend to wharves, &c., owned by private citizens.

The distinction has always been kept up in the state and municipal legislation, between the wharves, piers and slips, owned by the city, and those owned by individuals; and the latter are not *public* within the meaning of that word in laws and ordinances on the subject.

Nov. 13; Dec. 23, 1848.

CERTIORARI to one of the assistant justices' courts. The corporation of the city of New York sued Vandewater for a penalty of \$25, incurred by him as master of a barge, in so placing the same as to obstruct a pier (No. 17) in the Hudson river, which pier had been assigned by the common council to the exclusive use of two steamboats. The ordinance under which the penalty was claimed, is stated in the opinion of the court. The pier in question, which was between Cortland and Dey streets, was private property, in which the corporation of the city had no pecuniary interest, and had been leased by the owners to the proprietors of those steamboats. The same owners also owned the northerly side of the pier No. 16, which inclosed the other side of the slip below No. 17.

The justice gave judgment for the plaintiffs below against Vandewater for the amount of the penalty.

*C. Van Santvoord*, for the plaintiff in error.

*T. E. Tomlinson*, for the defendants in error.



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BY THE COURT. SANDFORD, J.—There are two classes of wharves and piers in the city of New York ; the one owned by individuals, the other by the corporation of the city. Some of the slips in the city belong to the corporation, while others lie between private piers, or adjoin a public or a private pier. The city government is by law authorized to make all such ordinances as it may deem proper, for regulating both classes of wharves and piers, as well as the slips. (2 R. L. 436, § 236.) By a statute passed in 1830, the corporation was empowered to pass laws designating and appropriating any of the public wharves, piers and slips, and such private wharves and piers in the city as the owners thereof might apply to have so designated or appropriated ; for the exclusive use of steamboats, or of any other class or description of ships or vessels ; and to restrain and prohibit any ship, steamboat, or other water craft, from coming into, or lying, mooring or anchoring, at or within any wharf, pier or slip, except the one so designated for their use ; and to impose penalties for the violation of such laws. (Laws of 1830, ch. 222, page 242.) The ninth section of the second title of the ordinance relative to “ Vessels, Wharves and Slips,” passed May 8th, 1839, (Corporation Ordinances, page 335, Ed. of 1845 ;) inflicts a penalty of \$25 on the master, &c. of any steamboat or barge, tow boat, &c., connected with any steamboat establishment, which shall come into or lay at or within any of the public docks, wharves, piers or slips of the city, or shall occupy the water belonging to the same, unless by special permission of the dock master, mayor, or other officer mentioned in the ordinance.

The offence for which the plaintiffs below recovered the penalty in this suit, was the laying of a barge across the entrance to the southerly side of pier No. 17, on the Hudson river, so as to obstruct the passage to and from the pier. It was proved, that pier No. 17 was private property, and had been leased by the owners to Simeon Fitch, and that the common council and the mayor had appropriated the southerly side of the pier to the exclusive use of the owners of two steamboats, during the period in question, provided the consent of the proprietors of the

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pier were first obtained. It was assumed that Mr. Fitch was the owner of the steamboats so permitted and designated.

The sole point in the case is, whether the ordinance imposing the penalty applies to private wharves and piers. It is plain that in express terms, it does not, for it speaks only of *public* wharves, piers, &c. But it is contended, that for the purposes of legislation and of police regulations of trade and commerce, and in view of the objects of the ordinance, all docks, wharves and slips, are public, and are under the control of the city authorities.

As to this argument, it may be remarked, first, that it is not well founded in respect of general legislation. The distinction between the wharves and piers owned by the city, and which are usually designated as public wharves, and those owned by individuals, is uniformly maintained in the laws of the state relating to this city, and in no statute is it more emphatically marked than in the act of 1830, which confers on the corporation the power to set apart wharves, &c., for certain classes and lines of vessels exclusively, and to protect their exclusive enjoyment by imposing penalties on intruders.

So in the municipal legislation, from a very early period, in the provisions regulating the wharves, &c., belonging to the city, they are designated indifferently as "public slips," &c., and as "wharves, piers, docks or slips, belonging to the corporation;" whereas, in ordinances evidently applicable to all the wharves and slips, whether owned by the corporation or by private persons, the language used is general, viz.: "any of the docks, wharves, piers or slips of this city." For example, in the ordinances of 1808, the provisions as to incumbrances and obstructions on the wharves and piers, and the emptying of the contents of privies, adopt the general language; while those regulating the coming into slips which are in process of cleansing, the use of piers by small coasters, and the length of time which vessels may lay at the piers; adopt the expression "public wharves," &c., and "wharves, &c., belonging to the corporation." The same distinction and modes of expression, are found in the ordinances of 1812, in which they are more numerous than in those of 1808. The number of illustrations

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of the same character is vastly increased in the revised ordinances of 1845 ; and private wharves are in those expressly recognized.

Indeed, after a careful examination of the published volume of ordinances now in force, we can find no sanction for holding, that in respect of police regulations, or those affecting trade, all wharves and piers are public, within the purview of the ordinances relative to vessels, wharves, and slips.

We do not anticipate the evil consequences, which the counsel for the plaintiffs below presents as the result of construing the ordinance in question according to its express terms. In general, private rights do not need the protection of municipal ordinances attaching penalties to their invasion. The laws provide adequate remedies for the redress of injuries to the owners or lessees of private piers and wharves ; and we can perceive no necessity for straining the language of an ordinance, which may be expedient and important for the protection of public property, to cover what is after all a trespass or a tort against individual rights. It may be conceded, that the authority of the city government, under the act of 1830, extends to the regulating in this mode the private wharves, which under that act are from time to time designated for the exclusive use of steamboats, &c. ; but it does not follow that the authority has ever been exercised.

We are clear, that the ordinance in question does not apply to private wharves and piers ; and the recovery in the court below was erroneous.

Judgment reversed.

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Shields v. Pettee.

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**SHIELDS and others v. PETTEE and MANN.**

Where goods are sold "*to arrive*" by a specified ship, the contract is conditional ; and if they do not arrive, the contract is at an end.

So where a sale was made of pig iron No. 1, on board the Siddons, which vessel was then at sea on her way to this port ; and she arrived with pig iron consigned to the seller, but which was not No. 1 ; it was *held*, that it was a *sale to arrive*, and the article never having arrived, neither party was bound by the contract.

On a sale of goods, if the buyer on receiving a part of the quantity sold, finds they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages, if he refuse to return the part delivered.

Nov. 25 ; Dec. 23, 1848.

**ASSUMPSIT** for a quantity of Gartsherie pig iron sold and delivered. The defendants pleaded the general issue, and gave notice that they would claim a recoupment of damages in respect of a part of the iron delivered, because of its not being No. 1, as called for by the contract, but of inferior quality. Also for damages for the plaintiffs non-performance of the same contract.

At the trial, the plaintiffs proved a bought and sold note signed by a broker in metals, as follows :

*New York, July 19, 1847.*

Sold for Messrs. G. W. SHIELDS & Co.

To Messrs. PETTEE & MANN.

150 tons Gartsherie pig iron, No. 1, at \$29 per ton, one-half at 6 months ; one-half cash, less 4 per cent.

On board Siddons.

THOS. INGHAM, Broker."

They also proved that the ship Siddons was at sea when the contract was made, which both parties understood, and she arrived about the 28th July, 1847. On her arrival, this kind of

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iron had advanced about \$2 per ton, by the 4th of August to \$3 per ton, and by 7th August, to \$3 50 per ton, beyond the contract price. The Siddons had on board a single lot of Gartsherie pig iron, consigned to the plaintiffs, G. W. Shields & Co., containing 150 tons and a fraction over. They immediately commenced delivering it to Pettee & Mann from the ship, and up to the 7th of August, P. & M. had received between 66 and 67 tons. The latter then declined to receive any more of the shipment as Gartsherie iron No. 1, they alleging that it was not No. 1, but of an inferior quality. They offered to refer it to some suitable person to say whether it was No. 1, and if he found it to be such, they would take it as No. 1. In their note to this effect, P. & M. said they had not refused to take the iron, and they asked the fulfilment of the contract, annexing a copy of the broker's sold note. Prior to this note, Shields & Co. had sent one of the same date to P. & M. saying they had received a message from P. & M. to the effect that they did not consider the iron as No. 1, and could not pay for it as such, although they had received more than one-third of the shipment. Shields & Co. then offered P. & M. the balance of the shipment in compliance with their contract, provided they would receive and pay for it as No. 1 pig iron. To this the answer before stated was returned. On receiving the answer, Shields & Co. wrote a note to P. & M., of same date, (August 7th,) stating that they understood P. & M.'s note to be a refusal to receive the remainder of the iron as No. 1; declining the reference; and informing them, if they persisted in the refusal of the iron at the price agreed upon, Shields & Co. would feel at liberty to sell it to other parties.

On the 10th August, Shields & Co. repeated this notice to P. & M. in a note, and informed P. & M. they should sell the iron on that day, if the former did not receive the remainder at once, on the terms in the contract. No answer being made to this, Shields & Co. presented a bill to Pettee & Mann for the iron delivered, made out at the contract price, and requested payment in cash and note, as therein stipulated. P. & M. declined to pay the bill, still demanding a fulfilment of the contract.

Shields & Co. thereupon, on the 17th of August, wrote a note

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to P. & M. stating their refusal to pay for the iron delivered, and demanding a return of the iron. Shields & Co. then stored the residue of the shipment, and subsequently sold it as No. 1 iron; and they then brought this suit to recover the value of the iron received by the defendants. On the part of the defendants, evidence was given to the effect that the iron so delivered to them was not No. 1 Gartscherie pig iron, but was a mixed lot, composed of Nos. 1, 2 and 3. There was counter evidence on this point on the part of the plaintiffs.

The judge, with the assent of the parties, reserved the questions of law arising in the case for the consideration of the court at bar, with leave to adjust the amount of the recovery, and submitted two questions of fact to the jury, which they answered by finding that the iron delivered to Pettee & Mann was not No. 1; and that the difference in value at the time of the delivery, between No. 1, and the iron so delivered, was one dollar per ton. The questions of law were now argued on a case.

*W. M. Evarts*, for the plaintiffs.

I. The contract was for the sale of a certain description and quality of iron on board the "Siddons," then at sea. This is equivalent to a sale "to arrive," and is contingent upon the arrival of the subject matter of sale. (Chitty on Cont. 4th Am. Ed. 351 and notes; Smith's Merc. Law, 518-9, and note; *Russell v. Nicoll*, 3 Wend. 112; *Boyd v. Siffkin*, 2 Campb. N. P. 326.)

II. By the contract, delivery and payment were to be simultaneous acts, and the refusal of the defendants to receive and pay under the contract, relieved the plaintiffs from any obligation to deliver under it.

III. The defendants, if their objection to the fulfilment of the contract was valid, had a right to return the portion of the iron delivered, or to require the plaintiffs to take it away; the plaintiffs offered to receive it back, and *demand*ed its return. The defendants refusing to return, retaining and using it, yet disclaiming it as in pursuance of the contract, must pay for it on a *quantum valebat*, viz., at \$31.50 per ton, the value found by

the jury. (Chitty on Cont. 341 and 352, and notes ; *Orendale v. Wetherell*, 9 B. & C. 386 ; *Mavor v. Pyne*, 3 Bing. 285 ; *Roberts v. Beatty*, 2 Penn. 63 ; *Corning v. Colt*, 5 Wend. 253.)

IV. If not liable upon the principle and at the rate of a *quantum valebat*, the defendants are liable for the quantity received at the contract price, without deduction, and without recoupment of damage. (*Corlies v. Gardner*, 2 Hall, 345.)

1. The defendants being entitled to the iron only under the express contract, must pay for it either at the express contract price, or upon a new implied contract according to its value.

2 The further delivery of the iron arrived was prevented solely by the refusal of the defendants to receive and pay for it according to the contract, the plaintiffs always being ready and offering to deliver ; there was, therefore, no defect or breach of contract on the part of the plaintiffs.

3. As the sale was contingent upon the arrival or non-arrival of the subject of sale, if it did *not* arrive the sale could not take effect, and there was no default. If it *did* arrive, the defendants were in default in not receiving and paying under the contract.

V. The rise in the market is the sole cause of the difficulty. The iron which arrived, though inferior to the contract grade, on arrival was worth \$2 50 per ton above the contract price, The plaintiffs, in good faith, were willing to complete the (to them) losing contract. The defendants, contriving for greater gain out of a (to them) gainful contract, attempted to avoid either accepting or repudiating the plaintiff's performance. Their cunning has over-reached itself, and the law raising a new implied contract, effects complete justice between the parties.

*J. L. White*, for the defendants.

I. By the evidence it is clear that the plaintiffs themselves failed to perform the contract declared upon.

The sale was of iron of a *particular kind*, and on board of a *particular vessel*. On the arrival of the vessel, the defendants were notified that the iron *purchased by them* had arrived and would be landed in a day or two, and they were requested to attend to it. After they had received a part of it, they dis-

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covered it was not No. 1, and they so notified the plaintiffs, but offered to take the lot as No. 1, if a competent person, to be selected by the plaintiffs, should so pronounce it. This the plaintiffs declined, and insisted upon defendants taking it as No. 1. The jury, on the evidence, found that the iron was not No. 1, and it is clear the plaintiffs failed to deliver the iron named in the contract of sale. And yet they sue for a breach of the agreement by the defendants. This entitles the defendants to recoup the damage sustained by them because of the non-delivery. (*Ives v. Van Epps*, 22 Wend. 155; *Van Epps v. Harrison*, 5 Hill, 63; *Battuman v. Price*, 3 *ibid.* 171.) The price which defendants agreed to give was \$29 per ton. The iron No. 1, was worth \$3 50 per ton more, and this the defendants lost, by the failure of the plaintiffs to deliver the iron; which, on 150 tons, is \$525.

Sixty-six tons were delivered to defendants of the iron which came on board the Siddons, and for this the plaintiffs charged the contract price for No. 1, viz. \$29 per ton.

Allowing to the plaintiffs the contract price for the sixty-six tons delivered, \$1914; and deducting by way of recoupment the \$525, and the judgment must be for \$1389.

If, however, the plaintiffs are not to be held to the price of the iron delivered, *as fixed by themselves*, but are allowed to charge for its market value, the amount of their claim would be \$2079, from which deduct \$525, and the balance would be \$1324.

II. It is claimed that we cannot recoup, because 1st. The iron was sold *to arrive*. 2d. The iron sold did not arrive; and 3d. That for this reason the contract fell through. This position he evidently rests mainly on the authority of *Russell v. Nicoll*, (3 Wend. 112.) That case differs materially from this. There, cotton was sold to arrive; but it was not then shipped, was not on its way, the *time of arrival was limited*, and the sellers were to have possession after the arrival, to have it reweighed, &c. The plaintiffs were non-suited because the contract was *entire* for the delivery of five hundred bales, and they had not proved the arrival of *all*; and besides, the contract was



*conditional*, depending upon the contingency of arrival by a time certain.

In this case, no time was fixed for the arrival. But the plaintiffs sold No. 1 iron on the Siddons, and the Siddons arrived. In the case referred to, the cotton was to be delivered *on its arrival*. The contingency of non-arrival was there provided for. The sale in question was not of iron *on arrival*, but of iron on board the Siddons, no matter where she was. The time designated for delivery was not fixed at a future time or place, as far as there could be a delivery, the iron was delivered when the sale was made. In the case of Russell, the argument of counsel, and the opinion of the court, rest on the fact that the cotton was to be *delivered on its arrival*; and as it did not *arrive*, the defendants were protected by their contract. In this case, the sale was *absolute*, with a warranty that the iron was on board the Siddons; and when she arrived, she had not the iron sold. Nothing was to be done by the plaintiffs, before the title to the iron passed to the defendants; and this is the test, whether the contract be executory or executed. (*Defreeze v. Trumpet*, 1 J. R. 274.) In every sale, there is a warranty of title to the thing sold, and in this case the quality was warranted also. The iron was sold as No. 1, and so specified in the contract of sale. This sale, then, did not "fall through," but was complete when made, depending on no contingency of arrival, and leaving for the plaintiffs nothing to do in relation to the subject matter of the sale. It was a sale of iron *in transitu*, where it was then, and not where it was to be thereafter. If this view be the correct one, (and the *terms* of the contract and the evidence show no other,) then the defendants may recoup their damages, as the plaintiffs sued *on the agreement*, and this cannot be prevented by an abandonment of the special counts, and a resort to the general counts. (22 Wend. 156; 4 *ibid.* 492.) As the iron delivered was retained, the defendants should undoubtedly pay for it; and the plaintiffs should compensate them for their damage arising from the non-delivery of the iron sold to them.

BY THE COURT. OAKLEY, CH. J.—On fully considering

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this case, we are satisfied the plaintiffs ought to recover for the iron delivered, without deduction, on two grounds.

*First.* The contract between the parties, was equivalent to a contract to sell and deliver iron *to arrive*; that is, it was an agreement to deliver Gartsherie pig iron No. 1, if any iron of that description arrived in the ship Siddons on the voyage she was then making. It is well settled that such a contract is conditional, and that if the ship be lost, or if the subject matter of the sale do not arrive in the ship, the contract is at an end. In this case the ship arrived, but there was no consignment of this pig iron No. 1 on board. Therefore as the law is settled, neither of these parties were bound to fulfil the broker's sale, or entitled to demand its fulfilment.

*Second.* We are also clearly of the opinion, that the plaintiffs can recover on another ground. Assuming the contract to have been obligatory, the defendants on finding the iron they were receiving was not No. 1, were at liberty to continue to receive it as a fulfilment of their purchase, or they could have repudiated the delivery and brought their action for damages. But they could not do both. They had no right to receive a part of the goods, retain such part, and refuse to receive the residue. They were bound to affirm or to rescind the contract, *in toto*. It was their duty either to have received the balance of the shipment, or on finding it was not what they had contracted for, to have returned what had been delivered to them and claim damages for a violation of the agreement.

It would seem that they desired to obtain the iron, and to claim damages also. This they could not do. They were bound to take their position, and either to receive the goods, or to abandon the part performance made, and resort to their claim for damages.

In either view of the case the contract was virtually at an end, and the plaintiffs are entitled to recover the market price of the iron delivered to the defendants, without any deduction.

Judgment accordingly.

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Kendall v. Stone.

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## KENDALL v. STONE.(a)

In an action for slander of title, the truth of the words may be given in evidence under the general issue.

Three things are necessary to maintain an action for slander of title. The words spoken must be false ; they must work an injury to the plaintiff in respect to his title ; and they must be malicious ; not malicious in the worst sense, but with intent to injure the plaintiff.

A person who utters words in the *bona fide* assertion and maintenance of his own title, is regarded as standing in a more favorable position, in an action for slander of title, than he who attacks the title of another without such cause, *it seems*.

In an action for slander of title, it is proper for the judge to charge the jury that the question for them to determine is, whether the defendant made the statements respecting the plaintiff's title *bona fide*, and under an honest impression of their being true ; or whether he made them maliciously, and for the purpose of slandering the plaintiff's title ; and that the question whether the words were spoken maliciously or *bona fide*, depends very much upon their truth or falsity, and the circumstances under which they were spoken ; whether honestly, to caution purchasers, or to alarm them with unfounded charges.

Where the evidence proves the speaking of words by the defendant, derogatory to the plaintiff's title, and that the person to whom they were spoken forebore, in consequence thereof, to complete a contemplated purchase of the property from the plaintiff, sufficient words, and a consequence from them sufficiently detrimental to the plaintiff, are shown to sustain an action ; provided *malice* in the defendant be also established.

Malice, in such an action, is a question of fact, and should be submitted to the jury. Proof of conversations of the defendant, other than those laid in the declaration, respecting the same title and subject, are admissible for the purpose of proving the *malice* of the defendant.

Though a witness can only testify to such facts as are within his own knowledge and recollection, yet he may refresh his memory by the use of a written memorandum. But where the witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the memorandum was not made by him, his testimony, so far as it is founded on the memorandum, is but hearsay.

In actions of tort, the jury are the proper judges of the weight and effect of the evidence ; and the court will not interfere with the damages found by them, unless they appear to be grossly disproportionate to the injury sustained.

In an action for slander of title, the judge is justifiable in charging the jury that they may give exemplary damages ; and in refusing to charge that they can only give compensatory, as distinguished from exemplary, damages.

Nov. 13, 14 ; Dec. 30, 1848.

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(a) OAKLEY, CH. J., was absent because of indisposition.

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THIS was an action to recover damages for an alleged slander of the plaintiff's title to certain lots of land situated in the sixteenth ward of the city of New York. The cause was tried in December, 1846. The plaintiff produced and read to the court, a deed of the premises in question, executed by the defendant and wife to the plaintiff, bearing date April 10, 1845, subject to a mortgage for \$3000, and interest from October, 1844, and subject also to assessments for opening Thirty-Seventh street and Madison Avenue. The deed contained no warranty whatever, but contained a covenant against the grantor's own acts.

ASA H. WHEELER, a witness for the plaintiff, testified that on the 28th of October, 1845, he negotiated with the plaintiff for the purchase of one of the lots for the sum of \$900, by a contract in writing, which was produced and read in evidence; that the lot was to be 25 feet in width, and of a depth equal to half of the block; the witness was to pay \$250 on the day of the date of the contract, (which he did,) and the balance as wanted; that the understanding with the defendant at the time of the purchase was, that the witness should go up the next morning and select a lot. That accordingly, he went up the next morning, and when on the way, he met the defendant, and had some conversation with him, but did not recollect whether he first mentioned to the defendant that he had purchased the lot, or he first spoke of it to the witness. That in the course of the conversation, the defendant told the witness that he, the defendant, had a mortgage on the property for \$3000, and that there was a state loan on it for \$3000; that there were liens upon it, or bills filed against it, by Mr. Reed; and that if it could be made to appear that Mr. Woolley had an interest in the lots, it would have a bearing upon them; and that he thought it risky to purchase of Mr. Kendall, the plaintiff, under these circumstances. The witness testified that it was a year or more since this conversation occurred, and it was difficult for him to recollect what was said; that he made a memorandum afterwards; that the defendant said it was risky to purchase of the plaintiff. That on another occasion, about a fortnight afterwards, the defendant said, Kendall could not

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give a warranty deed for those lots, as he, Stone, had not given one to Kendall. That during the first conversation, the defendant said he thought it his duty to inform those about purchasing the property, especially his friends and acquaintances, of the situation of the property. That the witness requested Mr. Wetmore to make searches, and he ascertained that there was no bill filed against the property, except on the mortgages. That on the day of the second conversation with the defendant, there had been a previous understanding that the plaintiff should call upon him at 12 o'clock, and the witness was to go with him to the defendant's store, to tender him the money, in order to get a release. That the defendant called upon the witness early that morning, and previous to the plaintiff's appointment, and inquired if Mr. Wetmore had found any liens on the property. On being informed that none had been found, the defendant insisted that there were claims or bills, and that Mr. Wetmore must have overlooked them. That on this conversation, the witness concluded to give up the property entirely.

That Stone also called on me at my rooms, and the import of the conversation was the same as at our previous interviews. He then stated, that Mr. Reed had filed a bill against Mr. Woolley, which he presumed he would be able to collect from a lot. I had then bought the lot, and paid a part of the purchase money.

The witness proceeded: Mr. Stone told me, that he had made an offer to Kendall for one of the lots. The offer was \$700; it was for a lot adjoining Stone in the rear. After this, I threw up the purchase, and Kendall gave me his note for \$250—the money I paid. I was fearful of getting into difficulty, and therefore gave up the purchase. Mr. Stone said he thought Kendall had better take his offer of \$700 for that lot, so that he would have money to pay off these liens. I should have taken the title of it, had it not been for what Mr. Stone said. I did not go to Mr. Stone to tender him the money, because in consequence of his previous conversations, I had made up my mind to give up the lot. I offered to raise the \$6000, to pay off both mortgages. I spoke to both Mr. Stone and Mr. Kendall about

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it. I did not do it, because I was fearful it would not be safe, according to Mr. Stone's account.

On being cross-examined, he testified that Isaac M. Woolley was the subscribing witness to the agreement mentioned in his direct examination; that the body of the agreement was in Mr. Woolley's handwriting; that Kendall was brother-in-law to Woolley. Witness could not say how long he had been negotiating before the agreement was made, perhaps two or three weeks; that he had a conversation with Woolley about it. Woolley was a particular friend of the witness, and wanted him to buy this property and build upon it.

The defendant's counsel then asked the witness the following question: "Who did you bargain with?" To which the counsel for the plaintiff objected; and the defendant's counsel proposed to go on and show the truth of the words spoken, under the general issue, to which the plaintiff's counsel objected. The court, after discussion, ruled that the defendant might show the truth of the words alleged to have been spoken, under the general issue, to which the plaintiff's counsel excepted. The witness proceeded, and in answer to the question, said: Mr. Woolley first called on the witness about the lots; this was about a week or ten days before; the witness did not agree to look at the lots, because he knew pretty much how they were situated; that he afterwards went to look at them, and Woolley and Kendall went with him; that Woolley gave him to understand that he was agent for Kendall; that witness did not call upon Mr. Reed previous to giving up the bargain, nor request Mr. Wetmore to do so; that when Stone called at the witness's room, he said that the purchase money was to be all paid to him, instead of the \$650, as that was the agreement between him and Kendall.

That the remarks of Stone, given at the first interview, were made in answer to inquiries made by witness, respecting the title of the lot.

On his further direct examination, this witness stated that it was difficult for him to give the residue of the conversation at the third interview; that Mr. Stone said he thought Woolley was concerned in the property, and was acting under a cloak;

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that he was a very troublesome man to deal with about money matters. He said the witness would find Mr. Woolley a difficult man to get along with ; that he was a very good man as long as money did not interfere ; witness presumed he first asked Stone about the title. The witness had no reason to believe or suppose that the title was not all right until Stone told him. That witness was not informed by either Woolley or Kendall, before his first interview with Stone, that there were any mortgages upon the lot.

WILLIAM C. WETMORE, another witness for the plaintiff, testified that Mr. Wheeler applied to him to search for mortgages and incumbrances against the lot, from the time of the mortgage to the commissioner of loans ; that he had a search made by the register, for taxes, assessments and liens in the several courts ; he was never asked to look at the back title ; Wheeler assumed that to be good ; that witness made the searches which showed a conveyance from Woolley and wife to Edward Stone, dated the 25th May, 1842, and recorded on the day of its date ; also a conveyance from Stone and wife to Kendall, by deed dated 10th April, 1845, and recorded April 14th, 1845 ; also a mortgage from Kendall and wife to Stone, dated April 10th, 1845, and recorded April 14th, 1845 ; that the search for assessments showed assessments unpaid for opening Thirty-seventh street, and assessments for opening Madison Avenue, also unpaid taxes due ; that the taxes of 1845, amounting to \$125, were unpaid ; that the searches in the supreme and the superior courts were made against Woolley from January 1st, 1838, to July, 1840, and against Edward Stone for 5 years previous to the 1st July, 1840, and no judgments found ; also searches were made in the common pleas, for five years prior to June 1st, 1842, against Woolley, and for ten years against Kendall and Stone ; that he found two judgments against Woolley before he conveyed to Stone, which were satisfied ; that there were two other judgments against Woolley, and some other incumbrances not satisfied, obtained after the lots were conveyed to Stone ; that none of the notices of lis pendens found touched the lots in question, and the witness reported that they formed no objection to the title ; and he told Mr. Wheeler that the title was



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satisfactory to him ; that it was usual to pay assessments and taxes out of the purchase money ; that they were in this case very trifling.

The plaintiff here produced the bill in chancery of *Stone v. Kendall & The Loan Commissioners*, filed February 2, 1846, to foreclose the above mortgage from Kendall to Stone, by which bill it appeared that the plaintiff and wife and the loan commissioners only, were made parties defendants.

JAMES HALL, another witness for the plaintiff, being asked if he had a conversation with Stone about the property in question, the counsel for the defendant objected thereto and to the admission of evidence of other slander than that alleged in the plaintiff's declaration. The judge ruled that he would permit the plaintiff to prove other remarks or declarations of Stone, for the purpose of showing malice, but not as a substantial ground of action or damage ; to which defendant's counsel excepted. The witness then testified to a conversation between him and the defendant, in which the latter stated that the plaintiff would not be able to give a clear title to the premises in question, as there were one or two mortgages upon it, at that time ; that he stated that he had one and that there was a state loan upon it, and the only way to get a clear title would be in case he, (Stone,) should foreclose upon the property, he could give a clear title, but Mr. Kendall could not, of course, give a clear title, as he, (Stone,) held a mortgage against him ; that Stone said he had offered to buy one of the lots of Kendall for \$700. It was a lot on the hill and witness thought one adjoining Stone's ; that Stone said he thought \$700, was as much as the lot was worth and as much as Kendall would realise from it for some time to come ; that the witness did not recollect when this conversation was, but he thought it was the latter part of November, 1845.

ALFRED W. WADDELL, testified to a conversation with the defendant, about the plaintiff's property on the hill, in November, 1845, at defendant's store ; that witness asked him the value of lots on Thirty-seventh street belonging to Mr. Kendall ; he said he thought they were worth about \$600 or \$700 ; that he mentioned that Mr. Wheeler had bought one for \$900, but that



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he had backed out, and thrown it up, on account of some difficulty about the title ; that witness either asked him, or he volunteered to tell, what the difficulty was, and he said that a bill had been filed, or would be filed in a day or two, against Mr. Kendall, by some person by the name of Reed, and that it was supposed Kendall was used as a cloak to cover the property of Woolley.

Some other witnesses were examined in respect to declarations made by the defendant concerning the plaintiff's title, whose testimony it is not necessary to give.

The plaintiff then read in evidence a deed from Woolley and wife to Stone, dated 25th May, 1842, for the consideration of \$5035, conveying the premises in question, and other lands. It was a warranty deed, with full covenants, subject to a mortgage to the state for \$4035, with interest from the first Tuesday of October, 1847, which Stone assumed to pay as a part of the consideration or purchase money.

The plaintiff's counsel then put in evidence the mortgage from Woolley to the loan commissioners, dated 12th August, 1837, for \$4035, upon which \$1035 had been paid on the 10th October, 1843.

Here the plaintiff's counsel rested, and the defendant's counsel thereupon moved the court to grant a non-suit, for these reasons :

I. This case being in the nature of an action for malicious prosecution, the plaintiff must prove the words, want of probable cause for believing them to be true, and special damages arising from and consequent upon the speaking of the words.

1. The words have not been proved. Wheeler is the only witness upon this subject, and his testimony should be excluded, because it was not testimony, but merely the reading by him of a memorandum.

2. But if his testimony be admissible, still the words laid in the declaration are not thereby or otherwise proved.

II. Because the plaintiffs have shown that most of the words used, or statements made by the defendant are true in point of fact ; those words and statements should therefore be consid-

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ered, so far as respects this question, as not contained in the declaration.

III. There is no proof of damages. The plaintiff must prove damages as the consequence of the particular words spoken.

The court refused a non-suit ; to which decision the defendant's counsel excepted.

The defendant's counsel having opened the defence to the jury offered to read in evidence a bill in chancery, filed before the vice-chancellor of the first circuit, in a case wherein Thomas Page was complainant, and Isaac M. Woolley and Josiah F. Kendall were defendants, filed 14th June, 1845, upon a judgment alleged to have been obtained against said Woolley on the 30th May, 1842, to which the plaintiff's counsel objected. The objection having been overruled and the plaintiff's counsel having excepted, the bill was read.

RICHARD REED, a witness for the defendant, testified that he was a counsellor at law and solicitor in chancery ; that he filed a bill in favor of Page against Woolley and Kendall ; the suit in which that bill was filed, was pending in November, 1845, and it was still pending. Being asked, "Did you ever communicate to Mr. Stone the fact that such a bill was filed?" the plaintiff's counsel objected to the question. The court having overruled the objection and the plaintiff's counsel having excepted, the witness answered that he did ; that he told him soon after the filing of the bill ; that he stated to him that he had filed a bill on behalf of Mr. Page, to recover the judgment described in the bill, and requested him to recollect the facts connected with it, as he supposed he (Stone,) would be wanted as a witness ; that he requested him to recollect the facts connected with the transaction between Woolley and Kendall ; that he referred to the transfer of the real estate, which he had conveyed to Kendall ; that he stated to him why he had filed the bill ; that he told Stone that it was Woolley's property, and that he proceeded on that ground ; that neither Kendall nor Woolley have ever answered that bill ; no process was served in the suit ; there had been several efforts to settle it ; that when the bill was filed it was without any understanding with Kendall and Woolley. Being asked by the counsel for the defend-

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ant if it was done in good faith ? he said it was, and with the intention of going on with it.

The testimony on both sides being closed, the counsel for the defendant renewed his motion for a non-suit, for the reasons above stated, and also upon the ground that the words spoken by the defendant, as alleged in the plaintiff's declaration, were proved to be true, and also proved to have been spoken in answer to inquiries made of the defendant, without any malice. The court refused to grant the motion for a non-suit, and the defendant's counsel excepted.

The counsel for the defendant requested the judge to charge the jury that if they should find in favor of the plaintiff, then they should find only such damages for the plaintiff as were the consequences of the words spoken.

The judge charged the jury as to damages as follows :

“Upon the subject of damages, if the words were spoken in good faith and without malice, there are to be no damages ; if not so spoken, it is otherwise. You can then award such damages as you think established by the evidence. If the defendant has been actuated by malicious motives, and with the desire of crippling the plaintiff and engrossing the property for less than its value, you are not obliged to estimate the amount with any great scrupulousness, nor be restrained by the inquiry how much the plaintiff has lost by losing the sale of his property. The offence of deliberately slandering another's title to property, from malicious or selfish motives, if proved, merits, and public example requires, such damages as are calculated to prevent the repetition of the offence by others, and you have a right not only to compensate the injured party for his loss, but to keep an eye to good morals and to public example. But you are not to act under the impulse of passion or prejudice, but as rational and sensible men, looking at the case and the evidence presented to you.”

The counsel for the defendant thereupon excepted to the charge.

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The jury found a verdict for the plaintiff for nine hundred dollars damages ; and the defendant moved for a new trial.

*W. Bliss*, for the plaintiff.

I. The motions for a non-suit were properly denied. The only question upon such motions is whether there was sufficient evidence to carry the cause to the jury ; and the ground of the motion must be properly taken and specifically stated. 1. The principles of actions for slanders of title will be found stated in *Hargrave v. Le Breton*, 4 Burr. 2422 ; *Smith v. Spooner*, 3 Taunt. R. 246, and cases there cited ; *Pitt v. Donovan*, 1 Maul. & Selwyn, 639 ; *Watson v. Reynolds*, 1 Moody & Malkin, 1 ; *Pater v. Baker*, 3 Man. Gran. & Scott, 831, 54. The essence of the action is a malicious depreciation of the plaintiff's title ; and the malice may be either express or implied. A person has a right to utter words in the "bona fide" assertion and maintenance of his own title, but not to attack the title of another, without such cause. 2. In the points taken upon the motions, the defendant does not deny that there is evidence tending to establish, with perhaps one exception, the particulars mentioned, but insists that they are not proved or established, or that other facts have been proved by the defendant. Questions not for the court but for the jury. 3. There was sufficient evidence of the speaking of the words. Upon a motion for a non-suit, an exception to the testimony cannot be taken. It is now held to be sufficient to prove the words in substance as laid. (Buller's N. P. 5 ; *Miller v. Miller*, 8 John. R. 74 ; *Olmstead v. Miller*, 1 Wend. 506 ; *Fox v. Vanderbeck*, 5 Cow. 513.) As examples, see *Doneasler v. Hewson*, 2 Man. & Ry. 176 ; *Dyer*, 75 ; *Miller v. Miller*, supra. It is not necessary to prove all the words, but so much of them only as will sustain the action. (5 Cow. 513 ; 1 Wend. R. 506.) See also Code of Procedure, § 145, 146, 147, 149, 151, now in force in all suits, as to what variances shall be deemed material, and what errors or defects in the pleadings or proceedings the court shall disregard or may amend. 4. The truth of words was matter of defence, and whether and how far established, was for the consideration of the jury. It was neither admitted nor shown by the plain-

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tiff. 5. There was sufficient proof of malice ; and the question of malice is exclusively for the jury. (*Boswell v. Osgood*, 3 Pick. R. 384 ; *Demarest v. Haring*, 6 Cow. R. 76 ; *Jarvis v. Hathaway*, 3 John. R. 183 ; Cooke on Law of Defamation, 38 ; *Kelly v. Partington*, 4 B. & Ad. 700.) The deliberate attempt to justify the charges as true, is itself evidence, and an admission of the malice. (*Root v. King*, 6 Cow. 624, Per Chancellor, 4 Wend. R. 139, S. C.) Words defamatory of a title, uttered by a stranger, that is not in assertion and vindication of one's own title, imply malice. (See *supra*.) There was abundant proof of actual malice. The question was fairly submitted, and the jury have found it against the defendant. 6. There was sufficient proof of special damage. The loss of the sale to Wheeler would alone support the action. 7. Want of probable cause is not of itself a requisite of this sort of action. In *Pater v. Baker*, (*supra*), Maule, J. says that the existence of probable cause "does not afford any answer to the action." In *Pitt v. Donovan*, Bailey and Dampier, J. J., only said that it was to be made out "where a person is not to be treated as a mere stranger." "Such a want," says J. Dampier, "as would induce a jury to infer that his conduct is founded in malice ;" while Lord Ellenborough, in his more able and elaborate opinion in that case, said that probable cause "was not strictly the issue." No decision can be shown that it is. The true point is malice. The jury have found the one, and negatived the other.

II. The defendant's exceptions to the admission and rejection of evidence were not well founded. 1. The witness, Wheeler, had a right to refresh his memory from the memorandum, and did nothing more. (*Robertson v. Lynch*, 18 J. R. 45 ; *Feeter v. Heath*, 11 Wend. R. 485 ; 1 Phil. Ev. 289.) If the words were correctly stated in the memorandum, the witness, also correctly stating them, must repeat. 2. The proof of other conversations of the defendant respecting the same title and subject was admissible, to prove malice ; for which purpose only they were stated to be offered and were received. (*Inman v. Foster*, 8 Wend. R. 602 ; *Kennedy v. Gifford*, 19 Wend. R. 296, are express decisions upon this point. So also, is *Tate v.*

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*Humphrey*, 2 Camp. R. 73, n.; *Lee v. Macguister*, 1 Camp. N. P. 48; *Lee v. Huson*, Peake, 166; *Warne v. Chadwell*, 2 Stark. R. 457; *Stuart v. Lovell*, 2 Stark. R. 93; *MacLeod v. Wakley*, 3 Car. & Payne, 311; *Child v. Affleck et ux.* 9 Barn. & Cress. 403; *Rogers v. Clifton*, 3 Bos. & Pul. 587; Buller's N. P. 72; Phil. Evid. (7th ed.) 246; *Bodwell v. Swan*, 3 Pick. R. 370; *Child v. Horner*, 13 Pick. 503; *Wallis v. Mead*, 3 Binney, 546; *Shock v. McChesney*, 2 Yeates, 473; *Kean v. McLaughlin*, 2 Serg. & Rawle, 469; *McArmstrong v. McClelland*, 14 Serg. & Rawle, 359; *Duvall v. Griffith*, 2 Har. & Gill, 30; *Miller v. Kerr*, 2 McCord, 285.) That a plea of justification is evidence of malice, being a repetition of the slander, is also a branch of the rule; (*Edgell v. Francis*, 1 Mann. & Granger, 222; *Caddy v. Barlow*, 1 Man. & Ry. 275.) Also cases of fraud; (*Alison v. Mathieu*, 3 John. R. 235; *Benham v. Cary*, 11 Wend. R. 83; *Jackson v. Timmerman*, 12 Wen. R. 299;) 3. There is nothing in the other exceptions; (1 Phil. Ev. (Cow. & Hill's ed.) 293; *Watson v. Court*, 2 Car. & Payne, 232.)

III. The charge of the judge was correct. It was founded on the doctrines of Lord Ellenborough, in *Pitt v. Donovan*. That portion of it relating to exemplary damages is according to the settled law of this state; (*Tillotson v. Cheetham*, 3 John R. 56; *Huston v. Hopkins*, 9 J. R. 37; *Hoyt v. Gelston*, 13 J. R. 141; *Woat v. Jenkins*, 14 J. R. 352; *Woodward v. Paine*, 15 J. R. 493; *Ex parte Bailey*, 2 Cow. R. 479; *Paddock v. Salisbury*, 2 Cow. R. 811, 3 J. R. 180; *Sargeant v. ———*, 5 Cow. R. 106; *Southard v. Rexford*, 5 Cow. 254; *Elliot v. Brown*, 2 Wend. R. 497; *Cable v. Dakin*, 20 Wend. R. 172; *Tift v. Culver*, 3 Hill R. 180; *Cook v. Ellis*, 6 Hill R. 465; *Burr v. Burr*, 7 Hill, 217, per Strong; Senator; *Auchmuty v. Tearn*, 1 Denio, 495; *Allen v. Addington*, 7 Wend. R. 9; *King v. Root*, Court of Errors, 4 Wend. R. 113, 133, 139; *McAlmont v. McClelland*, 14 Serg. & Rawle, 359; *Williams v. Cruise*, 1 Man. Gran. & Scott, 842, per Maule, J.; *Marest v. Harvey*, 5 Taun. 442.)

IV. The judge rightfully refused to charge that the jury could only give compensatory as contradistinguished from exemplary damages. (See last point.)

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V. In actions of tort, the jury are peculiarly the proper judges of the weight and effect of the evidence; and the court will not grant a new trial, because the damages are alleged to be excessive; unless the amount is so grossly outrageous and extravagant as manifestly to show partiality, prejudice or corruption. (*Cable v. Dakin*, 20 Wend. R. 172; *Marquisee v. Ormston*, 15 Wend. R. 368; *Sargeant v. ———*, 5 Cow. R. 106, 118, 119; *Coleman v. Southwick*, 9 John. R. 45; *Sharp v. Brice*, 2 W. Black. 942; *Williams v. Currie*, 1 Mann. Gran. & Scott, 841; *Edgell v. Francis*, 1 Mann. & Gran. 222; *Rost v. King*, 7 Cow. R. 637; S. C. 4 Wend. R. 135.)

There is no reason why this verdict should be disturbed. There was a malicious depreciation by the defendant of a title derived from himself, and for which he had received a full consideration.

*F. B. Cutting*, for the defendant.

I. The evidence of Wheeler, read from the memorandum made by him on the 12th February, 1846, more than three months after the conversation which it professes to record, ought not to have been received. (2 Cow. & Hill's Notes, 550, 750.)

II. The evidence of James Hall, as to the declarations alleged to have been made by the defendant to him in the fall of 1844, or early in the winter of 1845, ought not to have been received. The evidence of Alfred W. Waddell, and James A. Rich, of declarations alleged to have been made by the defendant to them, was not proper.

III. The motion for a non-suit ought to have been granted.

IV. The motion for a non-suit made after the testimony was closed, ought to have been granted. 1. Not only was there no evidence of want of probable cause, but the evidence showed that Stone had good reason to believe what he stated to be true; indeed that it *was true*. 2. The information was given in answer to inquiries, and required the plaintiff to prove express malice, in order to maintain his action.

V. The charge of the judge was erroneous and was calculated to mislead. 1. He charged that the question of malice depended upon the truth or falsity of the words spoken. 2. He



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ought not to have submitted to the jury, the question whether in point of fact "it was risky," to buy this property. 3. The jury were misled by the remarks in relation to the desire of the plaintiff to purchase a lot for \$700; and in relation to the evidence of Hall, Waddell and Rich; also in relation to the evidence from which the judge informed the jury they might infer bad motives in the defendant. 4. The rule of damages was wrong, and the result shows that it misled the jury. (Cooke's Law of Defamation, 223, 103; 4 Phill. Ev. 248; 2 Stark. on Sl. 103-4; 2 Greenl. § 254; Yelv. 89, note; 1 Esp. Rep. 48.)

BY THE COURT. VANDERPOEL, J.—It would seem from the books of reports of this state, that this is a rare action among us. They abound with actions for personal slander; but few, if any, actions for slander of title can be found in them. Not so, however, in England; the action there seems a frequent one, and the principles which govern it seem there pretty well established.

The action for slander of title differs in many particulars from the ordinary action of slander. The truth of the words may be given in evidence under the general issue. (Cooke's Law of Defamation, 27, and cases there cited.) In one particular, the charge of the judge was more favorable to the defendant than the law will warrant. He charged, at the request of the defendant's counsel, that if the words were not true in point of fact, yet, if the information thereby communicated by the defendant had been given to him, and he had probable cause to believe the same to be true, then a verdict should be rendered for the defendant. This was putting the action upon the same ground on which the action for malicious prosecution rests; a ground erroneous, but an error committed at the defendant's request, and one of which he cannot complain. In *Pater v. Baker*, (3 Man. Gran. & Scott, 831,) Maule, Justice, lays down what he looks upon to be the true rule. He says, the want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action. The action, he remarks, is for slander

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title, which he pronounces a sort of metaphorical expression. Three things are necessary to maintain the action. The words spoken must be false; they must work an injury to the plaintiff, in respect to his title; and they must be malicious; not malicious in the worst sense, but with intent to injure the plaintiff. (*Pitt v. Donovan*, 5 Maule & Sel. 639; *Smith v. Spooner*, 5 Taunt. 246.) The case of *Pitt v. Donovan*, was an action for slander of title, conveyed in a letter to a person about to purchase the estate of the plaintiff, imputing insanity to Y., from whom the plaintiff purchased it, and that the title would, therefore, be disputed, for which cause the person refused to complete the purchase. It was held, that the defendant who had married the sister of Y., who was heir at law to her brother, in the event of his dying without issue, was not to be considered as a mere stranger; and the question for the jury was, not whether they were satisfied, as men of good sense and good understanding, that Y. was insane, or that the defendant entertained a persuasion that he was insane, upon such grounds as would have persuaded a man of good sense and knowledge of business; but whether he acted *bona fide*, in the communication which he made, believing it to be true. From this and other cases, it would seem that a person who utters words in the bona fide assertion and maintenance of his own title, is regarded as standing in a more favorable position, in this action, than he who attacks the title of another, without such cause; and Cooke, in his Law of Defamation, p. 23, says, "As soon as it appears, that the defendant claimed title to the property, to which the slander applies, he is entitled to a non-suit;" citing *Gresham v. Grinsley*, (Yelv. 80.) We are not called upon to decide, in this case, whether the mere claim of title on the part of a defendant in this kind of action, no matter how false or pretended such claim, exempts him from the action; as the defendant here did not claim title himself. We can, however, readily perceive why a person, honestly asserting and maintaining his own title, should be protected, though such title should turn out to be *invalid*.

The judge charged the jury that the question for them to determine was, whether the defendant made the statements to

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Wheeler *bona fide*, and under an honest impression of their being true ; or whether he made them maliciously, and for the purpose of slandering the title of the plaintiff ; that the question whether the words were maliciously or *bona fide* spoken, depended very much upon their truth or falsity, the circumstances under which they were spoken ; whether honestly to caution purchasers, or to alarm them with bug-bears of his own creation.

The evidence of Wheeler abundantly proved the speaking of words derogatory to the plaintiff's title, and the fact that he forbore to complete his contemplated purchase of the plaintiff, in consequence of the speaking of the words. There is, therefore, no doubt that sufficient words, and a consequence from them sufficiently detrimental to the plaintiff, to sustain the action, are shown, provided *malice*, the other indispensable ingredient, be established.

This was a question of fact, and was fairly submitted by the judge to the jury. The whole charge proceeds on the ground that if the defendant honestly believed what he communicated to Wheeler, and cautioned him in a fair spirit, he was not liable ; but if he made the communication with a different spirit, to prevent the sale to Wheeler, so as to enable the defendant to get the plaintiff's property himself for less than its value, or from any other impure or corrupt motive, then he must be deemed to have spoken the words maliciously. We see nothing exceptionable in this view of the charge. It contemplates or holds out sufficient protection to them who speak honestly, with the sole and laudable view of cautioning a friend or acquaintance against purchasing property, the title to which the informant really *believes* to be imperfect. The policy of common law courts has always been to secure most perfect impunity for words spoken in such a spirit ; and we would be unwilling in the least degree, to circumscribe this privilege. This may, therefore, properly be denominated, what the action for malicious prosecution has justly been called, a hard or difficult action. The plaintiff assumes the burthen of proving, not only special loss, but actual malice, not that malice which the law implies in ordinary actions for defamation of the person ;

but *actual, express* malice. Still, hard and difficult to be maintained as the action is, where cases occur that give legitimate occasion for it, justice, and the security of property, require that it should be sustained. The infrequency with which it is resorted to, and the difficulty of sustaining it, afford an ample guaranty that it is not apt to lead to abuse.

The defendant contends, that the evidence of James Hall, Alfred W. Waddell, and James Rich, of declarations made to them, was not admissible. The proof of other conversations of the defendant, respecting the same title and subject, was admissible to prove the malice of the defendant; and for this purpose only were they offered and received. (*Kennedy v. Gifford*, 19 Wend. 296; 3 Pick. 370; 13 *ibid.* 503; *Rogers v. Clifton*, 3 Bos. & Pull. 587.) The *quo animo* the words charged were spoken, may be shown by evidence of conversation of the defendant, subsequent to the commencement of the suit.

It is further contended, that the use made by the witness, Wheeler, of his memorandum, was improper and rendered his testimony inadmissible. The court told the witness he could only use the memorandum to refresh his recollection. The witness, to be sure, on his cross-examination, said that in testifying from the memorandum, he read the memorandum, and then gave the words of the paper from recollection as derived from the paper, but the witness did not state that he had no recollection of the conversation, independently of what he derived from his memorandum. Indeed the witness had given evidence enough to show the speaking of the words, before the memorandum was introduced. Before we hear of any memorandum, the witness testified that the defendant told him he had a mortgage on the property for \$3000, and that there was a state loan on it for about \$3000; that there were liens upon it, or bills filed against it by Mr. Reed; and that, if it could be made to appear that Mr. Wooley had an interest in the lots it would have a bearing upon them, and that he thought it risky to purchase, under the circumstances, of Mr. Kendell. In *Robertson v. Lynch*, (18 John. 451,) the plaintiff's clerk testified that he had made the entry of the wool which was the subject of the suit, in the plaintiff's day book; but that he could not

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state the precise quantity, nor the different qualities, without refreshing his memory, by referring to a copy of the entries he had made ; and he was permitted to refer to the entries, and the court sanctioned it. In *Foster v. Heath*, (11 Wend. 478,) the chancellor said he could see no valid reason why witnesses should not be permitted to inspect written memoranda in court, provided they can, after such inspection, distinctly recollect the facts, independently of the written memorandum or document. The latter branch of this remark was not, perhaps, called for by the case. Greenleaf, in his *Evidence*, (vol. 1, p. 483,) says, "though a witness can only testify to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book ; but where the witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay ; and a witness can no more be permitted to give evidence of his inference, from what a third person has written, than from what a third person has said." This we regard as the true rule. If the witness did not write the memorandum, and never recognized it as true, it is but hearsay ; but where a witness made a memorandum of a conversation or transaction, so recently after its occurrence that he knows he then recollected it perfectly and committed it to paper faithfully, we cannot perceive any good principle to prevent him from reading his memorandum. In *Rex v. St. Martin's, Leicester*, (2 Adol. & Ellis, 210,) an agent made a parol lease, and entered a memorandum of the terms in a book, which was produced ; but the agent stated that he had no memory of the transaction, except from the book, without which he should not, of his own knowledge, be able to speak to the fact, but on reading the entry, he had no doubt that the fact really happened ; it was held sufficient. So, where a witness called to prove the execution of a deed, which he has witnessed, states that he has no knowledge of the fact, except from seeing his signature to the attestation, and says he is, therefore, sure that he saw the party execute the deed, *that* is sufficient proof of its execution. (1

Greenleaf, 485, and cases there cited.) In *Vaughan v. Hubbard*, (8 Barn. & Cress. 16,) it was held, that the witness might be permitted to refer to an entry of a transaction, made by him, although he stated that he had no memory of those things, except from the book, but that on reading the entry he had no doubt of its truth. (See also *Russell v. Coffin*, 8 Pick. 143, 150; *Jackson v. Christman*, 4 Wend. 277, 282.) We repeat, nothing transpired to violate the rule as laid down by the chancellor in *Foster v. Heath*, as the main part of the witness's testimony was given before the memorandum was introduced. Whatever our opinion may be, as to what is the most sound and reasonable rule, this case does not create a necessity, if we had the power or disposition to do so, to depart from the rule as held by the chancellor.

The next inquiry is, whether the judge properly charged the jury that they might give exemplary damages, and rightfully refused to charge that they could only give compensatory as distinguished from exemplary damages. In actions of tort, the jury are the proper judges of the weight and effect of the evidence, and the court will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained. (*Williams v. Cruise*, 1 Manning, Granger & Scott, 841.) That was an action for trespass, *quare clausum fregit*, against a landlord, by injuring the crop of his tenant, by felling and removing timber, without asking leave to enter. The jury assessed the damages at £300, when the value of the tenant's crop was only £200. The judge charged the jury that the plaintiff was not to be permitted to make a market of his grievance, but that they were not, necessarily, to limit the damages by the amount of pecuniary injury sustained. Beglar, Sergeant, *arguendo*, cited and commented upon a number of cases going to establish the principle that the jury are, by no means, always, in tort, to measure the damages by the amount of injury sustained. (*Perkins v. Proctor*, 2 Wel. 386.) In *Merest v. Harvey*, (5 Taunt. 442,) the jury gave £500 for breaking the plaintiff's close, treading down his grass and hunting for game, and the court held that the damages were not excessive, though it was probably ten times more than the injury

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actually sustained. Gibbs, Ch. J. says, "suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner—is the trespasser permitted to say, 'here is a half penny for you, which is the full extent of all the mischief I have done.'" And Heath, Justice, mentioned a case, where a jury gave £500 for merely knocking a man's hat off, and the court refused a new trial. In *Sharp v. Brice*, (2 W. B. 942,) De Gray, Ch. J., said that in *torts*, a greater latitude is allowed to jurors, and the damages must be excessive and outrageous, to require or warrant a new trial. (*Edgell v. Francis*, 1 Man. & Gran. 222.) On the whole, although we would have been better satisfied, had the damages been less, we do not feel disposed to interfere with the verdict, on the ground of their excessiveness.

New trial denied.

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MURPHY and KAVANAGH v. MOONEY.

An assistant justice has jurisdiction under the act of 1813, where the plaintiff resides in his district.

Where one defendant resides in the city and the other is a non-resident, they may be sued by a long summons; and it is no objection to the suit that the summons is served on the non-resident only.

Dec. 30, 1848.

CERTIORARI to the assistant justice for the district, including the eighth, ninth and fourteenth wards of the city of New York. The suit was commenced before him by Mooney against Murphy and Kavanagh, (by a summons having seven days to run,) for services rendered. The summons was served by copy on K. and personally on M. The defendants below made default, and on proof of Mooney's demand, the justice rendered a judgment in his favor. The defendants brought a certiorari, and

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assigned for error, that at the time of the commencement of the suit, Mooney was not a resident of either of the wards composing the district of the justice; and that Murphy then resided in the county of Queens, and Kavanagh in the twelfth ward of the city of New York, out of the jurisdiction of the justice. Also, that both ought to have been personally served with process.

To this assignment, Mooney pleaded that at the time of the commencement of the suit below, he resided in the eighth ward of the city. The plaintiffs in error demurred to the plea. They claimed that Mooney's residence was immaterial; and that the proceedings were void because commenced by a long summons served on a non-resident.

*E. C. Gray*, for the plaintiffs in error.

*Stevens & Hoxie*, for the defendant in error.

BY THE COURT. VANDERPOEL, J.—From the plea demurred to, it appears, that the plaintiff below was a resident of the eighth ward, being one of the wards for which the justice was appointed, and it appears too, that one of the defendants resided in Queen's County, and the other in the twelfth ward of the city.

The plaintiff below residing in the district of the justice, the latter had jurisdiction. (2 R. L. 379, § 103.) One of the defendants residing in the city, it was competent for the plaintiff to proceed by long summons. (*Harriott v. Van Cott*, 5 Hill, 285; *Burghart v. Rice*, 2 Denio, 95.)

The judgment must be affirmed.

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Cornell v. Smith.

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**CORNELL & WILBUR v. SMITH.**

An assistant justice elected under the act of 1848, has no jurisdiction, where the defendant and one of the plaintiffs reside in the city, and neither of the parties to the suit reside in a ward within the justice's district.

Appearing and pleading without objection, do not waive the defect nor confer jurisdiction; the statute being peremptory that the justice shall dismiss the cause.

Sections 57 and 61 in the code of procedure of 1848, do not extend to the effect and operation of pleadings as prescribed in title six; but only to their form and manner.

Hence an objection that a justice's court has not jurisdiction of the person, is not waived by an answer omitting to raise it.

Nov. 27; Dec. 30, 1848.

APPEAL by the defendant, from a judgment rendered in October, 1848, by the assistant justice of the first district in the city of New York, which district embraces the first, second, third, and fifth wards of the city. The plaintiffs below declared for freight of goods. The defendant pleaded a claim for goods of his which they had lost, and a tender of the balance. At the trial, it appeared amongst other things, that the plaintiff Wilbur resided in the ninth ward, in the third of the assistant justices districts; the plaintiff Cornell, in Kingston, Ulster County; and the defendant in the tenth ward, which is in the fourth district. Upon these facts appearing, the defendant moved to dismiss the cause for want of jurisdiction, which motion was denied; and after evidence on both sides, the justice gave judgment for the plaintiffs for the amount of their demand.

*E. Townsend*, for the appellant.

*C. Van Santvoord*, for the respondents.

BY THE COURT. OAKLEY, CH. J.—The appellant relies on the want of jurisdiction in the court below. The general statute on the subject is to be found in the act of 1813, relative to the city of New York, (2 Rev. Laws, 379, § 103;) which



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requires actions in the justices courts, to be prosecuted before the justice either in the ward in which the plaintiff or plaintiffs have resided for at least a month next before, or in the ward in which the defendants or one of them reside at the commencement of the action. If one of several plaintiffs reside in a different ward from the others, the suit must be brought only in the ward in which the defendants or one of them reside. And every assistant justice is thereby directed and required to dismiss every action brought before him contrary to the provisions of that section, with costs, in the same manner as if nonsuited on the merits.

The imperative direction to dismiss the suit, precludes any waiver from being inferred by pleading to the action and going to trial.

It is argued, and perhaps correctly, that this statute was modified by the act of 1820, which divided the city into four districts in respect of the assistant justices. (Laws of 1820, ch. 1, page 3.)

The third section provides that all suits shall be commenced before the assistant justice of the wards in which either the plaintiff or defendant shall reside, except suits by the city, or by or against non-residents.

The difficulty in this case is, that neither all the plaintiffs on the one side, nor the defendant on the other, were non-residents of the city. It is therefore not within the exception in the act of 1820, nor within the jurisdiction as provided by that act in connection with the act of 1813. So we think, that as the law stood before the code of procedure, the justice had no jurisdiction, and was bound to dismiss the suit.

It was however contended with much force, that sections 122 and 127 of the code, which require objections founded on want of jurisdiction of the person to be taken by demurrer or answer, relieve the plaintiffs from the difficulty, as no objection in that form was taken in the court below.

These sections are not directly applicable to the justices courts. (Code, § 8.) It is sought to make them applicable thus. Section 57 enacts that the provisions of the code respecting forms of action, pleadings and evidence, and the times of

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commencing actions, shall apply to the courts of justices of the peace, except that the pleadings may be oral, &c. Section 61 extends the provisions of section 57 to the marine court and assistant justices courts in this city, with some additions, not important here.

It seems, therefore, that for certain purposes section 122 does apply to the court below. The question is whether the word "pleadings," as used in section 57, is to be construed so as to include the *effect and operation* of the pleadings as prescribed in the code, or is to be limited to their *form or manner*.

The pleadings in the justices courts may be oral, but they must be the same kind of pleadings, as provided in the code; that is, there must be a complaint, a demurrer or answer, and a reply. This is very clearly the effect of the statute. It is further insisted, that the effect is included in the enactment as well as the form and manner, and the whole case turns on this point.

We have considered it very carefully, having in view the importance of the subject; and we cannot give to the word "pleadings," in section 57, the effect which the plaintiff's counsel claims for it. The more natural application of the word, as used in the section, is to the form and manner. Many consequences might possibly result from holding the contrary, bearing upon the manner of administering justice in the lower inferior courts, and materially affecting the practice in those courts. As for example, the necessity of proving the plaintiff's demand on the defendant's default, which has always been necessary. On the plaintiff's construction, it might follow that upon the defendant's default in appearing and answering, the justice under section 202 of the code, must give a judgment against him without any proof of the plaintiff's claim. A rule of construction that might lead to such consequences, should not be introduced without its being made to appear that such is the clear effect of the statute. The safe construction is to limit the meaning of sections 57 and 61, to the form and manner of pleadings, and not to extend them to their effect and operation. We adopt this view of the matter, and the result is that the justice below did not acquire jurisdiction.

Judgment reversed, without costs.

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Corp v. Brown.

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## CORP v. BROWN.

Under the section of the revised statutes forbidding any person to charge more than half of one per cent. for brokerage, soliciting or procuring the loan or forbearance of money, the broker or other person negotiating a loan, is entitled to only one half of one per cent., whether the loan be for a year, or for a term of years.

Nov. 22 ; Dec. 30, 1848.

THIS was an action brought by the plaintiff, to recover his fees and commissions as a broker, in procuring for the defendant a loan of \$30,000, for five years, upon certain real estate of the defendant. The amount claimed was one half per cent. on the sum loaned, for each year, and interest. The declaration contained the ordinary counts, and also special counts for services. The defendant pleaded the general issue as to all but the sum of \$150 ; and as to this amount, tender before suit brought. To this latter plea, the plaintiff replied, denying the tender. The cause was tried before Chief Justice OAKLEY, on the 11th day of May, 1848.

The plaintiff's counsel read in evidence, a copy of a rule of the court made in this cause, and served upon him on the 18th of December, 1847. This rule was made upon the payment into court by the defendant, of one hundred and fifty dollars, and in terms provided, that unless the plaintiff should accept the same, with costs to be taxed, in full discharge of the action, that sum should be struck out of the declaration in the cause, and the same be paid out of court to the plaintiff.

It was then shown by the plaintiff, that in the fall of 1847, he had acted as the agent of defendant, in procuring a loan of \$30,000 upon the real estate of the defendant, and that he had succeeded in effecting the loan for the period of five years.

The plaintiff rested. No testimony was offered on the part of the defendant. A verdict was rendered for the plaintiff for \$776 25, being the amount claimed and interest, subject to the adjustment of damages, and subject to the opinion of the court, on a case to be made.

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*J. M. Mason, and J. L. Mason, for the plaintiff.*

*F. B. Cutting, for the defendant.*

BY THE COURT. VANDERPOEL, J.—The section of the act upon which this case is to turn, is as follows: “No person shall, directly or indirectly, take or receive more than fifty cents for brokage, soliciting, driving, or procuring the loan or forbearance of one hundred dollars for one year, and in that proportion for a greater or less sum.” Is the plaintiff entitled, under this statute, to recover his commissions at the rate of half per cent. on the amount procured by him, for every year for which the loan was taken? or is he to be limited to half per cent., where the loan is for a term of years?

We have traced this section to its origin, and our researches have satisfied us, that the intention of the legislature never was to allow a broker the inordinate compensation here claimed. Previous to the last revision of our statutes, this provision was found in the “*Act for preventing usury.*” (1 R. L. 63, § 3.) In England, it is first found in the “*Act against usury.*” (21 James I., ch. 17; 2 Evans’ Stat. 285.) Next in 12 Chas. II., ch. 13; and in 12 Anne, ch. 16. (2 Evans’ Stat. 286, 287.) From these sources they were transferred to our act for preventing usury, passed 8th February, 1787. The revisors have not explained why they removed it from the usury act. They must have thought it more appropriately came under their title “*Of brokerage, stockjobbing, and pawnbrokers.*” Still, we may look to the place and the company in which this provision was *first* found, and so long afterwards continued, for a key to the intention of the legislature in respect to it. In the usury acts of England, above referred to, and in both of ours, (1 R. L. 62, and 1 R. S. 760,) the main section which prohibits the taking of more than a fixed rate of interest, contains these words: “And after that rate for a greater or less sum, *or for a longer or shorter time,*” the latter words being evidently employed to provide, that on a loan of money, the borrower should, *for each successive year*, pay the sum fixed as interest. In all the English statutes, the provision respecting the compensation to brokers

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is found in a section immediately preceding the one fixing the rate of interest. So, also, in our revised laws. If in two sections, the one so immediately following the other, in the second a portion of the words employed in the first are omitted, it shows that the legislature had an object in so marked an omission. Now, in the sections to prohibit usury are to be found, not only these words contained in the section fixing the premiums of brokers, "*And so after that rate for a greater or less sum,*" but the additional words, "*Or for a longer or shorter time.*" The omission of them in the second section, serves to show conclusively to our mind, that the legislature did not intend that the compensation of the broker should be increased in proportion to the "*longer time*" the loan was to run. The omission is too marked and studious not to indicate this object. The statute was passed evidently for the benefit of borrowers; to prevent the lender from practically evading the usury act, by interposing his broker between himself and the victim of his cupidity. Its object was to fix a limit beyond which the broker should not charge. It is a well known fact, that loans for a long time on good security, in this city, are more easily procured than short ones; and it is hardly to be presumed that the legislature intended to swell the broker's compensation according to the greater facility with which his duty is accomplished. We are satisfied, that the legislature intended to give only half per cent. on the sum loaned, without reference to the time it is to run.

The plaintiff must take up with the \$150 and interest.

Judgment accordingly.

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Norton v. Norton.

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**J. L. NORTON and others v. S. R. B. NORTON and others.(a)**

Every trustee of real estate is presumed to take as large an estate as is necessary for the purpose of the trust, and no more.

Where before the revised statutes, a husband conveyed to a trustee his title to his wife's land, in trust to dispose of it for her, and to manage it and collect the rents for her benefit ; it was *held*, that the trustee took an estate for the wife's life only, with a power in trust to dispose of the husband's life interest ; and the power not having been executed, the trust ceased on the wife's death, leaving the husband surviving.

If the deed had conveyed to the trustee the whole life estate of the husband, the wife's interest being a mere equitable estate for the life of another, on her death it would go to her administrator, and to her husband as entitled to her personal property subject to her debts ; and the trust, if outstanding, would thereupon, by the revised statutes, be converted into a legal estate.

Dec. 7 ; Dec. 30, 1848.

This was a suit for the partition of lands in the city of New York, whereof Sarah Norton, the wife of John L. Norton, died seised in fee. Mr. Norton, one of the plaintiffs, claimed a life estate in the premises as tenant by the curtesy. The defendant, Samuel R. B. Norton, among other matters of defence, set up that J. L. N. had no estate, right or interest in the premises.

The case was brought to argument on the issues of law formed by the pleadings. It appeared that on the 7th day of November, 1814, John L. Norton, by deed of that date, for a nominal consideration, granted, bargained, sold, aliened, remised and quit-claimed, unto Hannah Clinton, " her executors, administrators and assigns, all the estate, right, title, claim and demand, which in virtue of husband of Sarah Norton, he has in all the lands and lots of lands situate in the city of New York, which were devised to her by the will of her father, the late Walter Franklin ; but it is nevertheless declared that this conveyance is made in trust for the said Sarah Norton, giving her full power through her said trustee to dispose of said property,

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(a) Before SANDFORD, J. at the special term.

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collect rents, or do any other matter or thing relating to said property, without the let, suit, molestation or hinderance of the said John L. Norton." The questions argued, turned on the effect of this conveyance.

*J. H. Power*, for the plaintiff.

*H. M. Western*, for S. R. B. Norton.

*W. Watson*, for other parties.

SANDFORD, J.—In 1814, the premises in question belonged to Mrs. Norton in fee, by devise from her father. Her husband, John L. Norton, was tenant by the curtesy initiate, in the premises. His conveyance to Mrs. Clinton, at the most affected his initiate life estate. It may have operated upon an interest extending beyond the life of his wife, but it was in no sense a conveyance in fee.

Every trustee is presumed to take an estate as large as is necessary for the purpose of his trust, and no larger estate.(a)

The purpose of this trust was, *first*, for Mrs. Norton; and *second*, to empower her through the trustee, to dispose of the property, manage it, and collect the rents. The first object, and all of the second, except the power of disposal, were attainable by a trust which should cease on her death. For those objects, therefore, the estate of the trustee cannot be deemed to have extended beyond her life. The power to dispose of the property is limited to her alone. There is no limitation in favor of her heirs or devisees; nor any language from which an intention can be inferred that others were to execute the power. If she had executed it during her life, it would have operated merely to convey her husband's life estate. In order to have conveyed the fee of the land, it would have been necessary for her to join in the grant, in her own right, the legal estate of inheritance being still vested in her; and probably it would have been

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(a) See *Nicoll v. Walworth*, 4 Denio, 385.

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Norton v. Norton.

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equally necessary for her husband to have executed the grant by way of testifying his assent to her execution of the same. At all events, the grant of Mrs. Norton and the trustee, so far as it would have operated by force of the trust deed, would have conveyed no other or greater estate, than the life estate of her husband.

The question remains, was the portion of his life estate, intervening between Mrs. Norton's death, and its termination by his own death, conveyed to the trustee, and if so, did it descend to Mrs. Norton's heirs, or to her personal representatives?

I think that the effect of the trust deed was, to convey to the trustee merely an estate for the life of Mrs. Norton; and that the authority given to her to dispose of the residue of her husband's life interest, was no more than a power in trust, to be exercised by her through and in the name of the trustee. If so, the trust ceased on Mrs. Norton's death, and the plaintiff has a legal estate as tenant by the curtesy.

If, however, it be conceded that the deed of 1814, carried to the trustee all his estate, Mrs. Norton's trust interest under it, was nothing more than an equitable estate for the life of her husband; and on her death it belonged to her administrators. (2 R. S. 82, § 6, subd. 1; 2 R. L. 365, § 4.) Her husband thus became entitled to the entire interest, as personal property, and it vested in him as such, without administration, subject to the payment of her debts. (2 R. S. 75, § 29.)

If the trust were to be deemed outstanding, it would be a naked trust of the plaintiff's life estate, created by himself, and remaining in Mrs. Clinton, for his own benefit. The revised statutes convert all such trusts into legal estates, (2 R. S. 727, § 47;) and the result is, that in any mode of construing this trust deed, the plaintiff has a legal life estate in possession of the premises in question.

This disposes of the point argued before me at the special term. For the purpose of ascertaining the facts in issue, I will direct a reference, and the order may provide for the requisite examination as to title and liens, preliminary to a partition.



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NITCHIE v. TOWNSEND.

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## NITCHIE v. TOWNSEND.

In order to preserve the lien of a chattel mortgage from year to year, a copy thereof, with a statement exhibiting the interest of the mortgagee in the property, must be filed in the office of the register or clerk, within thirty days preceding the expiration of one year from the time of filing the mortgage ; and a new copy must be filed every successive year.

Every copy thus filed, is to be regarded as a new mortgage.

N. was the holder of a chattel mortgage upon the property of C., which was filed June 22, 1846. A copy, with a statement of the mortgagee's interest, was filed June 18, 1847. T. recovered a judgment against C., and issued an execution thereon, by virtue of which the mortgage property was levied upon on the 19th of June, 1848, at noon. A second copy of the mortgage, with the statement, was filed on the same day, at 40 minutes past 2 o'clock, P. M., after the levy, (the 18th being Sunday.) *Held*, that the copy filed on the 18th of June, 1847, ceased to be valid as a lien against creditors, in one year from that time ; that although the 18th of June was Sunday, that day must be computed ; and that the execution must prevail, as against the mortgage.

Nov. 27 ; Dec. 30, 1848.

THIS cause was submitted on a case made under the 372d section of the Amended Code. The facts are these : On the 22d day of June, 1846, one Ambrose Cormier made and executed to the plaintiff, a mortgage upon his goods and chattels, then being on the premises occupied by him as a residence and place of business, in Walker street in the city of New York, to secure to the plaintiff \$643 50, due to him for arrears of rent upon the same premises, on the 21st day of June, 1845. This mortgage was filed June 22d, 1846. On the 18th of June, 1847, at 50 minutes past 10 o'clock, a copy of the mortgage and schedule annexed, was filed in the office of the register of the city and county of New York, with a statement in writing, signed by the mortgagee in conformity with the statute, that the whole of the principal and interest secured by the mortgage, remained due and unpaid. On the 19th of June, 1848, at 40 minutes past 2 o'clock, P. M., another copy of the mortgage and schedule was filed in the register's office, with the following statement endorsed thereon :

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"I, John E. Nitchie, the mortgagee of the mortgage, of which the foregoing is a true copy, do hereby certify that there remains due to me on the said mortgage, the whole of the principal with interest; and that this copy and certificate are filed to continue the notice required by the statute in such case made and provided.

"Given under my hand, this 19th June, 1848.

"JOHN E. NITCHIE."

The defendant in this cause was the owner of a judgment for \$577 03, recovered against Cormier on the 30th day of May, 1844, in the superior court of the city of New York. On the 19th day of June, 1848, the day of the filing of the last copy of the mortgage, but at half past 12 o'clock of that day, the defendant's attorney issued an execution upon the judgment for the amount due thereon, and delivered the same to the sheriff, who levied it on the goods and chattels of Cormier which were embraced in the mortgage to the plaintiff. The levy was made by the sheriff on the same day, and before the last renewal had been made, and the copy of the mortgage and schedule filed.

*G. M. Speir*, for the plaintiff.

*D. M. Cowdrey*, for the defendant.

BY THE COURT. VANDERPOEL, J.—The only question in this case arises under the act requiring mortgages of personal property to be filed.

One Cormier executed a mortgage of personal property to the plaintiff, which was first filed June 22, 1846. A copy was filed June 18th, 1847, at 50 minutes past 10 o'clock, A. M. The defendant recovered a judgment, and issued an execution against Cormier, by virtue of which the property covered by the mortgage was levied upon on the 19th of June, 1848, at noon, before the filing of another copy of the mortgage, which was filed on the same day, but after the levy. The 18th of June was Sunday. The act provides, that "Every mortgage filed in pursuance of the act, shall cease to be valid against the creditors of

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**The City of New York v. Corlies.**

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the person making the same, or against subsequent purchasers and mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register of the town or city where the mortgagor shall then reside."

We think, that in order to preserve the lien of the mortgage, it is necessary to file a new copy within thirty days preceding the expiration of the first year, and so on from year to year, if the mortgagor wishes to continue his lien. Every copy thus filed must be regarded as a new mortgage.

It being necessary to file copies every successive year, we are also of opinion, that the copy filed on the 18th of June, 1847, at 50 minutes past 10 o'clock, ceased to be valid, as a lien against creditors, in one year from that time; and although the 18th of June was Sunday, that day must be computed. The day of filing the copy, does not relate back to the day of filing the original mortgage. The execution of the defendant here, must prevail as against the mortgage.

Judgment accordingly.

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**THE MAYOR, &C. OF THE CITY OF NEW YORK v. CORLIES.**

Where premises have been demised for a term of years, and are in the actual occupation of the tenant when a penalty is incurred upon such premises, for a violation of an ordinance of a municipal corporation, the tenant is liable for the penalty, and not the landlord.

Nov. 25; Dec. 30, 1848.

THIS was an appeal from the assistant justices' court of the City of New York. The action was brought against the de-

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fendant in the court below, as the owner of premises in Water street, in the city of New York, to recover a penalty given by the following ordinance of the city: "No person shall cast or lay, or suffer to run in or upon, or within three feet of any wharf, or in any lane, alley, lot, or vacant place, to the southward of 14th street, the contents of any sink, tub, privy or cistpool under the penalty of \$10 for each offence." The complainant alleged that the defendant on the 22d of July, 1848, and at divers times, had violated the ordinance by suffering the contents of the sink at his premises in Water street, to run into the adjoining lot. In defence of the action, it was set up that the legal title of the premises in question, was vested in Henry Vail, Joseph W. Corlies, (the defendant,) Valentine G. Hall and Nathaniel Weed, executors, and Cecile Tonnele, executrix of the last will and testament of Laurent Salles, deceased, and that the co-executors and executrix should have been joined with him as defendants. The general issue was also pleaded.

Upon the trial it was admitted that the premises in question were a part of the estate of Laurent Salles, and that the defendant was one of the executors, and that the legal estate was vested in the executors under the will. The street inspector testified that on the 22d of July, 1848, the contents of the privy on the premises leaked, and ran on to the adjoining lot; that he complained to the defendant, who said he would have it attended to. The ordinance upon which the action was brought, was then duly proved. On the part of the defendant it was shown by the agent of Laurent Salles' estate, that at the time complained of, the premises in question were leased for 5 years from the preceding May, and were then occupied by the lessee. It was also proven, that by the terms of the lease, the tenant was to make all repairs. The street inspector, on his cross-examination, testified that the defendant was not in possession of the premises. The assistant justice rendered judgment for the plaintiffs.

*W. B. Leeds*, for the appellant.

I. The property in respect to which this penalty was incurred is vested in the executors of Laurent Salles, deceased, of whom

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the defendant is one. If the owners of the lot are liable at all, the action should have been brought against all the executors, jointly, and not against the defendant alone. Where joint tenants, or tenants in common are chargeable in respect to their real estate, they should all be joined in the action, even though it be in form *ex delicto*. And if all are not joined the party sued alone may plead in abatement. (1 Chit. Pl. 83, 87.)

II. But the owners of the property were not liable for the penalty, to recover which the suit was brought. The premises being in the occupation of a tenant who had covenanted to repair, the action should have been brought against him and not against the landlords, or either one of them. (1 Chit. Pl. 83. 4 T. R. 318. Taylor's Land. & Ten. 95, 96, 101.)

*T. E. Tomlinson*, for the respondent. The question as to defendant's liability is reduced to this. Had he such a control over the premises as to have prevented a violation of the ordinance? If he had, he "suffered" the violation. The law is well settled that the landlord has such a right. (Taylor's Landlord and Tenant, 94. *Proude v. Hollis*, 1 B. & C. 68, 7 Pick. 76.) This power being in the defendant, it was his duty to have exercised it; and having neglected to do so, he is liable for the penalty incurred.

BY THE COURT. VANDERPOEL, J.—The question is, whether the landlord here is liable for the penalty. The premises had been demised for the term of five years, and were actually in the possession of the tenant, when the penalty accrued. As between landlord and tenant, there is no implied covenant that the former shall repair. (*Hart v. Windsor*, 12 Mees. & Wels. 68.) And in *Payne v. Rogers*, 2 H. Black. 350, it was held, that if the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger, from the want of repair. Butler, J. said, he agreed that the tenant, as occupier, is *prima facie* liable to the public, whatever private agreement there may be between him and the landlord; but if he can show that the landlord is to repair, the landlord is liable for neglect to repair. The court

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held the landlord, in that case, liable, to prevent circuitry of action; as the tenant would have his remedy over against his landlord. In *Cheetham v. Hampson*, 4 T. R. 318, an action on the case was brought for not repairing fences, whereby the plaintiff was injured, and it was held, that it could only be maintained against the occupier, and not against the owner of the fee, who is not in possession. Lord Kenyon then well says, "Deplorable, indeed, would be the situation of landlords, if they were liable to be harassed with actions for the culpable neglect of their tenants." And Buller, J. says, that the instances of such actions against owners were, where the *tenentes et occupatoses* were the same, but the action lies against them only in the latter capacity.

So in *Regina v. Sir John Buckrall*, 2 Ld. Ray. 804, an information was exhibited against the defendant for not repairing a bridge, because he was lord of the manor; but it was held, by all the judges, that the *defendant's lessee* was bound to repair the bridge. The defendant, as landlord, was not liable for this penalty, and the judgment must be reversed.

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WINSLOW & MORRIS v. KIERSKI.

Since the code of procedure, there is no provision nor practice requiring bills of particulars to be given.

Where the marine court rendered judgment against the plaintiff for not furnishing such a bill, after he had exhibited his complaint, for services as attorney in two specified suits since the code; the judgment was reversed.

The plaintiff may be compelled to amend an insufficient complaint, before requiring the defendant to answer.

January 17; January 27, 1849.

APPEAL from the marine court, where Winslow & Morris sued Kierski for services as attorneys and counsellors. They filed their complaint in writing, stating among other things, their retainer by the defendant K. in October, 1848, to prosecute

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two suits in his behalf in the supreme court, specifying the same ; that they prosecuted the same until K. settled them with the parties by a compromise ; and that the services of W. & M. in those suits were worth \$84, on account of which they had been paid \$34. Also, that W. & M. had paid for K., \$3 34, for serving the complaint in one of those suits. On the complaint being filed in the marine court, the defendant demanded a bill of particulars of the items of W. & M.'s demand ; and the court directed such bill to be given. The plaintiffs, W. & M., declined to furnish a bill of particulars, whereupon the defendant refused to answer the complaint. W. & M. then demanded judgment for want of an answer, which the court refused to grant ; and on the contrary, entered a judgment *non pros* against W. & M., for omitting to furnish a bill of particulars.

*Winslow & Morris*, appellants in person.

*Wightman & Clark*, for the respondents.

BY THE COURT. OAKLEY, CH. J.—Since the code of procedure took effect, there is no longer any provision or practice requiring bills of particulars to be given. The 135th section of the code was not applicable to the complaint below. There was no allegation, nor any reasonable inference, that the plaintiff's demand consisted of more than twenty items.

If the complaint was insufficient, the plaintiffs might have been compelled to amend it, before the defendant could have been required to answer. But no application of that kind was made to the court below. It is clear, the court was not authorized to give judgment against the plaintiff because of his omission to furnish the particulars on the demand made.

The plaintiffs claimed against their client for services as attorneys in two specified suits. The code gave a fixed compensation for such services, for each stage of the respective suits. There could have been no surprise or want of information on the part of the defendant, as to the extent and character of the claim. Whether the claim were correct or not, would depend

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upon the evidence ; and he was at liberty to question both the retainer and the amount.

Judgment reversed.

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SMITH v. OLIPHANT AND WIFE.

An infant is liable for money lent and advanced, which was lent in and about the purchase of necessaries for the infant, and which was so applied directly by the lender, and under his directions.

The action upon the infant's liability in such a case, may be brought for money lent and advanced.

An objection to a pleading, that it is argumentative, is ground for special demurrer only, and the demurrer must show in express terms what portion of the pleading constitutes the alleged argument.

Where one plea covers several distinct causes of action, a replication to the plea singling out and supporting one of such causes, is not demurrable.

The money counts combined with a single *assumpsit* applied to the whole, may be treated in pleading as distinct causes of action.

January 17 ; February 10, 1849.

THIS cause came before the court on demurrers to the plaintiff's replications. Several grounds of demurrer to each were specified. The action was against the husband, and his sureties on an attachment bond given to discharge a foreign attachment issued against him and his wife. The breaches assigned in the declaration were on promises made by the wife before marriage. Among other pleas, the defendants pleaded that the wife was an infant when the promises were made. The third breach or sub-count in the declaration was in the form of an *indebitatus assumpsit* for money lent and advanced, money paid, laid out, and expended, and money had and received, by the wife ; all combined in a single count, with a single promise. There were other sub-counts for goods, &c. sold, and an account stated. The plea of infancy applied to all these sub-counts.

The replication, professing to answer all the plea except as to the money had and received, and the account stated, (and as to those, *nolle prosequi*,) alleged that the goods, &c., were neces-



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saries, and the money paid, &c., was paid, &c., for necessaries; and as to the money lent, it averred that the same was so lent and advanced by the plaintiff in and about, and for the purchase of, and was by his directions at the time applied in purchasing and supplying the infant with necessaries, fit and suitable to her then degree, estate and condition.

There was a series of sub-counts, founded on promises made by the husband after marriage, to pay these demands against the wife. As to these, the plaintiff discontinued his suit after the defendants pleaded.

*A. Mathews*, for the defendant, cited as to the claim for money lent, *Probert v. Knouth*, 2 Esp. N. P. 472, note; Buller's N. P. 154, notes a. b.; *Darby v. Boucher*, 1 Salk. 278; *Earle v. Peake*, 1 ibid. 386; Chitty on Cont. 151; 3 Steph. N. P. 2052; *Randall v. Sweet*, 1 Denio, 460; 2 Kent's Comm. 235, 6th ed.

*C. T. Cromwell*, for the plaintiff, on the same point, cited *Randall v. Sweet*, 1 Denio, 460; *Ellis v. Ellis*, 12 Mod. 197; 5 Mod. 368; 10 ibid. 67; Comb. 482; 3 Salk. 197; 1 Ld. Raym. 344; Macph. on Infants, 505, 6.

BY THE COURT. SANDFORD, J.—Several of the causes of demurrer assigned were overruled when this case was before us last fall; and we will confine our attention to the points which were not then decided.

1. The objection to the first replication to the third plea, that it is argumentative, is not properly presented in the demurrer. This is a ground for special demurrer only, and the defect must therefore be specified in express terms, so as to show what portion of the pleading constitutes the alleged argument.

2. The omission to state *when* the money alleged to be lent to Mrs. O. while sole, was in fact lent. We think the time alleged in the declaration may be referred to in aid of this omission; but waiving that, the defect is one of so little importance that we will disregard it, and direct an amendment, without imposing any terms.

3. As to the money lent, the replication is said to be double

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and multifarious, and to plead the evidence. This objection is not well taken, provided the replication be a good answer to the plea on this point; which is the principal question that remains to be considered. There is nothing stated which is not essential to sustain a claim against an infant for money lent; therefore, the formal objections to the statement are ill founded. Whether the whole statement suffices, is another question.

4. The replication, it is said, is bad because it does not answer, or profess to answer, the whole of the plea. The plea goes to all the promises of Mrs. O. while sole. The replication excepts the promises in the declaration, founded on the money had and received and the account stated.

We perceive no difficulty in the matter. A plea may, and often does, cover many distinct and independent causes of action set forth in the declaration. Yet the replication to such a plea may single out one cause of action, and make a good answer to the plea, when it would be no answer in support of any of the other claims. The account stated in this case, is plainly a distinct and independent cause of action. Then as to the money had and received. The three *indebitatus* claims for money, which are usually called the money counts, have for many years been combined in one count, with a single *assumpsit* applied to the whole. But they are nevertheless entirely distinct causes of action, and are to be so treated in pleading. On the same principle, and with the same effect, a plea of set-off is permitted to embrace a great variety of causes of action; and it is deemed a separate plea for each, whenever it becomes necessary to discriminate between them. (*Mercein v. Smith*, 2 Hill, 213; Barbour on Set Off, 164, 5.)

5. The substantial question involved in the demurrer, is whether an infant can be made liable for money lent and advanced, which the lender has lent in and about the purchase of necessaries for the infant, and which was so applied directly by the lender, and under his directions.

In *Randall v. Sweet*, (1 Denio, 460,) Ch. J. Bronson, in delivering the opinion of the court, says, an infant is answerable for money borrowed under such circumstances. That case

may be sustained on the ground, that it was for money paid ; but the court treated it as being one for money lent, and held the infant to be liable. We think it may be regarded as an authority upon the point.

If, however, it were an opinion merely, we assent fully to its correctness. It is true, that in general, an infant is not liable for money which he has borrowed ; and it has been decided that the lender cannot recover, although it be proved that the infant actually laid out the money in necessities. The reason given is, that by intrusting the money to the infant, he was enabled to spend it in dissipation if he had been so minded ; and his subsequent judicious use of it could not confer a right of action, when none existed at the time of the loan.

On the other hand, there are many authorities which show, that where an infant has incurred a debt for necessities, one who, at his request, pays such debt, may recover against him for the money paid. On the same principle, and with greater reason, should the infant be deemed liable for money lent and applied by the lender in procuring him necessities. But it is said, that such an application establishes a demand for money paid for the infant's use ; not a demand for money lent.

It may well be, that the person so applying his money, can recover it under a count for money paid, laid out and expended. Money lent is not unfrequently applied by the lender, directly to the use for which the borrower obtains it ; but it is nevertheless money lent and advanced. In the case made by this replication, the lender, upon the request of the infant, advanced money to the latter, by laying it out in the purchase of necessities ; thus using his more mature judgment in respect of price and quality. No debt was incurred to the one who furnished the necessities ; and there was no liability of the infant to be discharged by the payment of the money. This was strictly money lent and advanced.

In the instances of money paid, for which infants have been held liable, the debts had been previously incurred, and the party furnishing the money, simply discharged such debts. It is manifest, that the true interests of an infant would be more likely to be promoted by the direct application of the money to

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the purchase by the lender ; and that the claim founded upon such an advance, stands on higher ground than that for money paid. The replication is therefore good in substance.

The first replication to the fourth plea, labors under one difficulty which is not obviated by our conclusion upon the replication to the third plea. It does not tender an issue or a verification, which is a defect that we cannot disregard. The plaintiff may now amend in this respect, as he should have done on his attention being called to it by the demurrer.

The defendants, if foiled in their objections to the replications, seek to attack the declaration. This, we are satisfied, they are at liberty to do, according to the established practice, upon any ground that would be fatal on a general demurrer.

The defect principally urged is, that the declaration contains two inconsistent causes of action. This is answered by the plaintiff's showing that he has discontinued his suit as to all the counts founded upon the promises of the husband after marriage. The discontinuance is pronounced by the defendant to be incongruous, and a monster unknown to the law.

This is not the place to decide on the regularity or the propriety of the discontinuance. The portions of the declaration discontinued are to be deemed separate causes of action, the same as if in separate counts ; and in this respect, we perceive no irregularity. The mode and the terms of discontinuing, are matters of practice, to be settled on motion. The other objections to the declaration are not well taken.

Judgment accordingly.

## DAVID M. WATKINS v. JANE F. HALSTEAD.

An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law ; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.

A promise made by a married woman to pay for goods purchased by her during coverture, is void ; and the law will not raise an implied promise by her from such consideration. Neither will such precedent consideration support an express promise by her to pay the debt, made after her divorce from her husband.

The doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation.

January 20 ; Feb. 10, 1849.

THIS was an appeal by the defendant from the marine court. The plaintiff's complaint against the defendant was for \$52 05 due him for goods, wares and merchandise, together with interest from May 27, 1846. The defendant answered, that at the time of the alleged sale and delivery of the goods, she was the wife of David P. Halstead, who was alone liable for the payment thereof. The plaintiff replied, that the defendant was not, at the time, living with David P. Halstead as his wife ; and further, that she was divorced from her husband, by a decree of the court of chancery, on or about the 2d of November, 1846 ; that although the bill of goods mentioned in the complaint, was contracted for by the defendant on or about the 14th of May, 1846, and while the defendant was the wife of David P. Halstead, yet they were sold and delivered to her while she was living separate from her husband, and as a feme sole ; and that after she was divorced from her husband, to wit : on the 2d of November, 1846, she repeatedly promised to pay for the goods, and did pay for a part of the goods originally sold her ; and that she then promised to pay the balance of the bill to the plaintiff, to wit, the sum of \$52 05. That the plaintiff, at the defendant's request, brought a suit for the bill against David P. Halstead, in the marine court ; and was nonsuited in that action, on the ground that the present defendant had deserted

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her husband, and was living separate from him when the bill of goods was sold and delivered to her, and that therefore, David P. Halstead was not liable therefor. That since that suit was decided, and subsequent to the divorce, the defendant had recognized the bill as her debt, and promised to pay the same. And that the defendant had a separate property of her own, and an income of \$500 per annum, or more, and was abundantly able to pay the debt. On the trial, the plaintiff proved the sale and delivery of the goods to the defendant, in May, 1846, while she was living separate from her husband; though the plaintiff's clerk, who delivered the goods, was not aware of that fact at the time. The bill amounted to \$66 43. She promised in July, August, or September, 1846, to pay the bill. She afterwards came to the plaintiff's store, and returned goods to the amount of \$12 50, which were credited on the account, and she promised to pay the balance. She wanted her husband to pay it, but said if he did not, she would. That the plaintiff sued the defendant's husband, at her request, and failed in the suit. Another witness testified, that he presented the bill to the defendant, in October, 1847. She promised to pay it as soon as she got the means to do it, and said, she did not intend that the plaintiff should lose the bill; that it had been out of her power to pay it before. She admitted the bill to be correct, and promised to pay it as soon as she got the means.

The defendant's counsel admitted, that the defendant obtained a decree of divorce in the court of chancery, against her husband, for adultery, on the 2d of November, 1846. He also admitted that the defendant, through her trustee, owned a separate estate. The amount due, with interest computed to the time of the trial, was proved to be \$60 24. The defendant thereupon moved for judgment, on the ground that the promise proved to have been made by her, after her divorce, was void for want of consideration; and that no sufficient moral obligation existed previous to such promise to pay for the same, as the credit was not given upon the strength of the defendant's liability, but upon that of her husband.

The court gave judgment for the plaintiff for \$60 24, besides

costs. The defendant appealed to this court, assigning the following grounds of appeal: 1. Because the summons was not in the form, nor subscribed in the manner, required by the code of procedure. 2. Because the promise proved to have been made by the defendant, was void for want of consideration; neither was it founded upon any sufficient moral or legal obligation to pay for the goods. 3. Because the promise was in fact a promise to pay the debt of another person, viz.: the defendant's former husband; and was therefore void upon two grounds, first, as being a debt already existing, and second, for not being in writing. 4. Because the judgment includes \$8 10 interest, which the defendant never promised to pay, either before or after her divorce.

*David P. Hall*, for the plaintiff.

*T. W. Clerke*, for the defendant.

BY THE COURT. VANDERPOEL, J.—The question is, whether there is a sufficient consideration to support the promise upon which the suit is brought? Our first impressions were rather favorable to the action; but a reference to the authorities and principles upon which the notion of a moral consideration to support a promise rests, has satisfied us that the promise relied upon cannot be sustained.

It is not pretended that, independently of the express promise of the appellant after she obtained her decree of divorce, this action could be sustained. If, when the debt was contracted, when the goods were delivered, any person was liable, it was the husband. We see nothing in the case to exempt him from liability. The appellant was then a *feme covert*, and clearly not liable. Her promise to pay was made after she was divorced, and if that promise is not supported by an adequate consideration, the action must fail.

In a note to *Wennall v. Adney*, (2 Bos. & Pul. 252,) the rule as to what precedent consideration will support an express promise, is laid down with a precision and accuracy that have commended it to repeated judicial approbation. It is there said,

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that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law ; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. This rule was approved by Justice Spencer, in *Smith v. Ward*, (13 John. 257 ;) by Brouson, J., in *Eyle v. Judson*, (24 Wend. 97 ;) and by Lord Denman, in *Eastwood v. Kenyon*, (11 Adol. & Ellis, 438.) Tested by this rule, this promise must surely fail. The precedent consideration relied upon, never could have been enforced through the medium of an implied promise, because, 1st. The wife was incapable, at the origin of the consideration, of making a valid promise ; and 2d. The goods, in contemplation of law, were sold on the credit of another, (the husband.) The original promise, whether express or implied, on the sale of the goods, when the defendant was under coverture, was altogether void. As Pattison, J., says in *Meyer v. Howorth*, (8 Adol. & Ellis, 467,) "Such promise was not like that of an infant, *voidable* ; but was *void*." That case was somewhat similar to the present. It was an action for goods sold to the defendant, at her request, and delivered to another with whom, it turned out, that she lived in adultery, and for work and labor, money paid, and an account stated. The defendant pleaded coverture at the time of the promise. The plaintiff replied, that the defendant, at the time when the debt was contracted, was living separate from her husband, and in open adultery with another, to whom she ordered the goods delivered ; that the plaintiff did not, when he dealt with defendant, know that she was a married woman, or that she lived in adultery, and dealt with her as a *feme sole* ; and that, after the death of the husband, in consideration of the premises, she promised to pay the demand. Although the case turned chiefly on the pleadings, (the replication being held to be a departure from the declaration,) yet the language of the judges shows, they were of opinion that the action on the new promise, could not be sustained, for the reason, as they say, that the first promise was altogether *void*, not *voidable*. The idea cannot be



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tolerated, that a precedent consideration can support a subsequent express promise, when the law cannot only not raise any implied promise from such consideration, but where even an express promise, made when the consideration originated, would be void.

The counsel for the respondent depends upon the case of *Lee v. Muggeridge*, (5 Taunt. 36,) where a *feme covert*, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced, at her request, to her son-in-law. After her husband's decease, she wrote, promising that her executors should settle the bond. It was held, that assumpsit would lie against the executors on this promise of the testatrix. Though that case differs from the present, in the important particular, that the defendant there had an estate settled to her separate use, yet the case has not been regarded as very good authority, at least in respect to some expressions that dropped from the judges in delivering judgment.

In *Eastwood v. Kenyon*, (11 Adol. & Ellis, 438,) Lord Denman, in an able opinion, in which he approves of the note to *Wennall v. Adney*, (3 Bos. & Pul. 294,) says, that the case of *Lee v. Muggeridge*, must be allowed to be decidedly at variance with the doctrine in this note, which, as before remarked, has been held to be law, in 13 John. 257, and 24 Wend. 97. Lord Denman also speaks of the case of *Littlefield v. Shee*, (2 Barn. & Adol. 811,) in which Lord Tenterden remarked, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation. Lord Denham regards this sentence as amounting to a dissent from the authority of *Lee v. Muggeridge*, where the doctrine is wholly unqualified. He seems to think it remarkable too, that neither in *Lee v. Muggeridge*, nor in *Cooper v. Martin*, (4 East, 76,) was there any allusion made to the learned note in 3d Bosanquet & Puller, above referred to. (See also, *Geer v. Archer*, 2 Barb. Sup. C. R. 420; *Kennedy v. Male*, 8 Missouri Rep. 698. 8 Alabama Rep. 399.)

On the whole, we are of opinion, that the precedent consideration in this case, cannot support the subsequent promise; and we hold with Lord Tenterden, in *Littlefield v. Shee*, that the

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doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation.

The judgment below must be reversed.

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**PALMER v. WETMORE.**

A landlord who owns land adjoining the demised premises, has a right to build on such land, though he may thereby obstruct and darken the windows in the tenement demised.

Such an act exercised on land not embraced in the demise, cannot operate as an eviction, even if it were a ground for damages.

January 26 ; February 9, 1849.

COVENANT on an agreement to pay the rent of the house and lot No. 832 Broadway, if default should be made in payment by the tenant, Julia A. Wetmore. The demise was for three years from May 1, 1847, at \$700 per annum, payable quarterly, and the rent claimed was for the quarter ending Nov. 1, 1847. The defence was an eviction of the tenant by the plaintiff, prior to November 1, 1847, in several modes set up in the plea.

At the trial before SANDFORD, J., in June, 1848, the proof of eviction was rested on two grounds, only one of which it is deemed necessary to mention.

It was shown, that the plaintiff owned several vacant lots of ground on Fourteenth street, the most westerly of which adjoined the east end of the lot demised to Miss Wetmore, and extended a considerable distance both to the north and the south, beyond the north-east and south-east corners of that lot. In the summer of 1847, the plaintiff commenced the erection of a large hotel on his Fourteenth street lots, the western wall of which was built on the line of the lot so bounding the demised premises on the east. This wall was from fifteen to eighteen feet distant from the rear of the house demised, and as it advanced in height, obstructed the light entering the rear windows

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of the latter. When the wall reached two stories in height, it darkened the kitchen so that lamps were requisite there in the day time; and it interfered with the free circulation of air. The hotel wall was finally carried to the height of six stories. The windows in it opened upon the back yard of the house in question. Miss Wetmore abandoned the demised premises, about the middle of October, 1847.

The defendant claimed that the evidence established an eviction of the tenant by the acts of the plaintiff, in respect of light and air, and as to the value of the premises as a boarding house, for which she had hired them.

The judge charged the jury, that the testimony in regard to light, was not to be taken into consideration. That the plaintiff had a right to erect any building he chose on the adjoining lot. The mere fact that the demised premises had less light in consequence of the hotel building, was not sufficient to constitute an eviction. The jury rendered a verdict for the plaintiff; and the defendant moved for a new trial.

*W. C. Prime*, for the defendant.

*W. P. Lee*, for the plaintiff.

BY THE COURT. OAKLEY, CH. J.—The defendant's counsel strenuously contends, that the rule which authorizes every man to use his own property as he sees fit, not trespassing on his neighbor's rights, does not apply to a landlord in respect of his lands adjoining premises demised by him; and that such landlord cannot use or improve his adjoining lands in any manner that will interfere with the use or enjoyment of the demised premises in the possession of the tenant. That the relative condition of the two lots must continue the same throughout the term, if any change in the state of the lot not leased, will in any degree lessen or prejudice the enjoyment or uses of the lot demised.

We have examined the question, and do not consider the distinction made as to a landlord's property a sound one. Where there is no question of ancient lights, (and there is none

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in this case,) the owner of a lot adjoining a house, may so improve or build upon his lot, as to shut up the windows of such house that are situated in the end or side adjacent to his lot. If this were not so, he would be deprived of the full benefit of his own property. We perceive no reason why a landlord, in respect of his tenant, is more restricted as to his vacant lots, than he would be in respect of any other owner for years, or in fee, of an adjacent house.

But if an action could be sustained for damages in such a case as this, there was clearly no eviction of the tenant. The exercise of a right which appertained to the plaintiff as the owner of the adjoining land, could not amount to an eviction of the tenant of another lot.

Motion for a new trial denied.

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**PALMER v. THE MAYOR, &C., OF THE CITY OF NEW YORK.**

Where a part of the items of an account bear date within six years before suit brought, they will not draw after them items of a longer standing than six years, so as to protect them from the operation of the statute of limitations; unless there have been mutual accounts, and reciprocal demands, between the parties.

A special justice of the city of New York, receiving an annual salary for his services in that capacity, cannot recover extra compensation for services performed on Sunday.

This is so especially where he has, at the end of every quarter during his term of office, rendered an account against the corporation for the amount of his salary, and has received his pay, without making any claim for extra compensation.

A public officer receiving a fixed salary for his services, cannot rightfully claim a compensation beyond his salary, for performing a new duty, or one imposed upon him since the salary was fixed; much less if he accepts the office with full knowledge of the resolution requiring the extra duties to be performed.

January 17; February 17, 1849.

THIS was an action of assumpsit brought by the plaintiff, to recover compensation for services performed by him on Sundays, as one of the special justices of the city of New York.

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Palmer v. The City of New York.

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Upon the trial, the following facts appeared in evidence: On the 1st of October, 1834, the plaintiff was appointed one of the special justices for the city of New York. His commission expired in 1838, and he was then re-appointed, and continued in office until May 30, 1842. The salary attached to the office was \$1600 per year. On the 3d of August, 1836, before his re-appointment, a resolution was approved by the mayor, having previously passed both branches of the common council, as follows: "Resolved, That the Police Magistrates be requested to attend, one or more of them, during the Sabbath." In consequence of this resolution, the plaintiff was in attendance every Sabbath during his continuance in office, and for the services thus rendered, instituted this action. It appeared, that at the end of each quarter subsequent to his appointment, the plaintiff submitted an account to the defendants, made out against the city of New York, as follows: "Salary as Special Justice for preserving the peace, &c., for the quarter ending this date, \$400." These accounts were paid from time to time, by the comptroller's drafts upon the city treasurer, payable to and indorsed by the plaintiff.

It was contended, on the part of the plaintiff, that the statute did not require the performance of this duty upon the Sabbath, and that the resolution of the common council was in the nature of a special retainer.

It was contended in opposition to this, that the defendant had rendered no other services than such as were called for by the office, and that he therefore was not entitled to extra compensation; and in addition to this, that the plaintiff had accepted the office a second time, after the passage of the resolution of the common council, and was therefore well aware of the duties he would be called on to perform; that the plaintiff was precluded by his accounts rendered, from setting up the claim in suit; and that, at all events, the statute of limitations was a bar to his claim for the services preceding his last appointment.

A verdict was taken for the plaintiff for \$1,835 48, being the amount claimed and interest, subject to the opinion of the court.

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*E. Sandford*, for the plaintiff.

I. The plaintiff's duties as a special justice, are provided for by the act of 1813; (Laws of 1813, ch. 86, secs. 24, 25, 26, 43;) and in the due exercise of the powers thereby conferred, the common council, (acting within the scope of their authority,) fixed the compensation of such officers, but exempted them from doing duty on Sunday. (Ibid. sec. 53.)

II. The resolution of the common council, of the 3d of August, 1836, was a retainer or request by the defendants to the plaintiff, to perform extra services which the special justices were not required to do by the statute under which they were appointed.

III. An implied assumpsit therefore arises, that the plaintiff is entitled to recover for the extra work incurred on Sundays at the request of the defendants.

IV. The plea of the statute of limitations does not apply. The first item of the plaintiff's account was more than six years old, but the last is in May, 1842. (*Chamberlain v. Cuyler*, 9 Wend. 126; *Tucker v. Ives*, 6 Cow. 193.)

*A. J. Willard*, and *Willis Hall*, for the defendants.

I. The plaintiff has rendered no services but such as are called for in the regular discharge of the duties of his office, and is consequently entitled to receive no extra compensation.

(1.) A salaried officer cannot claim extra compensation for services requisite to the fulfilment of his official duty, although arising from the application of unusual vigilance and faithfulness. (*Hatch v. Mason*, 15 Wend. 44; *Bath v. Salter*, Hutch's Rep. 54; *Phoenix v. Supervisor of New York*, 1 Hill, 362; *United States v. Fillebrown*, 7 Peters', 28.)

(2.) The attendance of the plaintiff at the police office on Sundays, if at all necessary, was called for by the nature of the office. (*Watts v. Van Ness*, 1 Hill, 76.)

II. The act of 1813, in prohibiting the common council from directing the police courts to be kept open on Sundays, does not convert that into an extra service which would otherwise have been a part of the ordinary duty of the plaintiff, as police officer.

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(1.) So far as the attendance on Sundays was prohibited by law, the act, being illegal, cannot form the ground work of any claim for compensation.

(2.) If the Common Council had no right to require the plaintiffs to attend on Sundays, the officers had no right to attend.

III. The act of 1813 only intended to prevent the *police court* from being open on Sundays, but did not interfere with the officers attending at the police offices in the performance of other duties. On the contrary, it imposes on the special justice the duty of discharging the night-watch *every morning*, which necessarily includes Sundays.

IV. The act of 1844 virtually repeals the prohibition of the act of 1813, in this respect.

V. If the plaintiff have a valid claim for extra services, it is not against the city, but the state at large; or, if a county charge, against the supervisors.

(1.) The city can only be made liable by virtue of a law imposing a particular duty upon it, or

(2.) In pursuance of some contract, express or implied, neither of which circumstances apply to this case.

BY THE COURT.—VANDERPOEL, J. The question involved in this case was presented to the court more than two years ago, in the case of *Henry W. Merritt*, and was then decided in favor of the plaintiff. One of the then members of the court did not concur in the conclusion to which it then came. Since that period, a partial change has taken place in the organization of the court, which accounts, in some measure, for the discrepancy between the conclusion in the present case, and the one formerly announced in that of *Merritt*. The 37th section of the act to reduce general laws relating to the city of New York into one act, provides that three justices shall be appointed as often as it shall be deemed necessary, each of whom shall be denominated, in the commission to him, a special justice for preserving the peace in the city of New York. (2 R. L. 350.) The 43d section, (p. 355) provides that it shall be lawful for the Common Council of the city, from time to time, to direct, by an

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ordinance or ordinances, the keeping open of the police office for the transaction of the business thereof, at all such times (Sundays excepted,) and at such place or places, as may be deemed most beneficial to the public, and that it shall be the duty of the special justices, and all the officers employed in the police office, to obey such mandate.

The plaintiff was first appointed in 1834. It is admitted that his commission expired in 1838, and that he was then re-appointed.

In regard to his claim for the period anterior to his last appointment, the statute of limitations is an insuperable bar. That portion of his claim which accrued before six years prior to the commencement of the suit, is not saved by 2 R. S. 224, § 6, which provides that in actions of debt, account, or assumpsit brought to recover any balance due upon a mutual, open, and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account. One or more items of an account, within six years before suit brought, will not draw after it items beyond six years, so as to protect them from the operation of the statute of limitations, unless there have been mutual accounts and reciprocal demands between the parties. (*Kimball v. Brown*, 7 Wend. 322; *Coster v. Murray*, 5 J. Ch. R. 522; *Edmondstone v. Thomson*, 15 Wend. 554; *Hallock v. Losee*, 1 Sand. R. 220.) It cannot be pretended that there were any mutual accounts and reciprocal demands between these parties. If the defendants were under a legal obligation to pay for the service for which the suit was brought, the plaintiff might have enforced such payment, if not immediately after the rendition of the service, at least at the end of every quarter. By holding, that the statute of limitations is a bar to this portion of the plaintiff's claim, we do not mean to imply that it would be valid, in the absence of the statute. We do not feel called upon to express any opinion upon the other objections urged against this branch of the claim, as we deem the statute of limitations a conclusive bar to it.

As to that portion of the claim which accrued *subsequent* to the second appointment of the plaintiff, we consider the objections to it conclusive on other grounds. The salary of the jus-



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tice had been raised to sixteen hundred dollars per annum. At each quarter, subsequent to his appointment, the plaintiff rendered an account of \$400, "as salary as special justice for preserving the peace, for the quarter ending" on the day of the date of his account, which account for each quarter, was paid by the defendants. This circumstance, at least, goes far to show the construction which the plaintiff himself then placed upon the rights and duties of himself and the defendants. No charge for extra or special services was then made or pretended to by him. The plaintiff, on his re-appointment in 1838, accepted his office with this resolution staring him in the face—a resolution requesting him to attend at the police office on Sunday, in his official capacity. If he performed these services as part of his official duty when he received a stated salary, he cannot sustain an extra charge for them, whether recently after rendering the service, he presented a claim or not. But when, quarter after quarter, and year after year, he presented his account for his salary, without lisping a word about this claim for extra service, it is pretty manifest that the charge is the result of an after thought, and was not contemplated when the service was rendered. But this consideration furnishes not the most formidable impediment to the plaintiff's action.

If the duty were legitimately imposed upon the plaintiff, and were a duty appertaining to, or connected with, his office, then he could not sustain his action, even if the duties were imposed after his second appointment; for it is well established that a salary officer cannot rightfully claim compensation *extra* his salary, for performing a new duty, or one imposed by the legislature, since the salary was provided. (*Phœnix v. The Supervisors of New York*, 1 Hill, 362.) If the new duty renders his office too onerous, he can resign. So a constable, or other ministerial officer, the fees of whose official services are prescribed by law, cannot maintain an action on a promise of extra compensation for extra service, although services beyond what could legally be required, are rendered by the officer. In *Hatch v. Mann*, (15 Wend. 44,) the Chancellor and Senator Tracy inveigh with well merited severity against the idea that a promise

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to give extra compensation to an officer for extra diligence or extra service, can be valid.

If, on the other hand, the corporation had no right to exact the service, either because the statute, by excepting Sunday, intended to guard against the performance of any secular services on that day, or, because it was beyond the legal powers of the corporation to request or demand the performance of the service; in either alternative, the law cannot imply a valid promise to pay for the service. In *Watts v. Van Ness*, (1 Hill, 76,) it was held that an attorney's clerk, engaged at a weekly salary to do such things as are usually done by clerks in attorney's offices, is prohibited, by the statute to prevent working on Sunday, from recovering from his principal a compensation *extra* his weekly allowance, for services as a clerk, performed on that day. If the plaintiff was not compelled to perform Sunday service because *it was Sunday*, then the services were within the prohibition of the statute against working on Sunday, (1 R. S. 675, § 70,) and therefore do not furnish the legitimate ground of a claim against the defendants. If the corporation, in their official or legislative capacity, had no right to make the request contained in their resolution, then they transcended their authority, and could not create a claim against the city by it. If they had a right to request the performance of the service, then it was part of the official duty of the plaintiff, when he accepted his office, on his re-appointment, and was covered and satisfied by his salary. Then he accepted the office in reference to the duties and burthen which belonged to it, this Sunday service being one of them. In every point of view in which we have looked at the case, we find insurmountable difficulties in the way of the plaintiff's recovering. There must, therefore, be judgment for the defendants.

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Olmsted v. Elder.

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## OLMSTED v. ELDER.(a)

Under the act for loaning the United States deposit fund, (Laws of 1837, ch. 150,) on the failure of the borrower to pay the annual interest at the time prescribed, the loan commissioners become seised of the lands mortgaged, so that the mortgagor (not having paid the debt and costs after the default and before the sale,) cannot maintain ejectment to obtain possession.

The production of the mortgage having no entry upon it of the payment of interest, and the efflux of time, are sufficient to establish presumptively the default in the payment of the annual interest.

The loan commissioners having assumed to sell on such a default, and conveyed to a purchaser who entered into possession, it was *held*, that if the sale were irregular, the deed transferred the mortgage to the purchaser, who thus being a mortgagee in possession, could retain the possession until redemption.

January 22, 24 ; Feb. 17, 1849.

EJECTMENT for a lot in Ninth-street, in the city of New York. The declaration claimed the premises in fee, and alleged a seisin of the plaintiff, on the 5th January, 1841. At the trial before OAKLEY, Ch. J., in February, 1848, it was admitted that on the 20th of April, 1838, S. A. Bostwick owned the premises in fee, and that the defendant was in possession at the commencement of the suit. The plaintiff then showed title in herself deduced from Bostwick.

The defendant then read in evidence a mortgage executed by Bostwick to the loan commissioners of the city and county of New York, appointed under the act of 1837, to loan the United States deposit fund, dated April 18th, 1838, for \$3000, with interest, payable on the first Tuesday of October, annually. There was no indorsement or proof of payment of the interest, which fell due in October, 1841. It was admitted that the premises were duly advertised by the United States Loan Commissioners, to be sold on the first Tuesday of February, 1842, pursuant to the act of 1837. The defendant next read in evi-

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(a) VANDERPOEL, J. having formerly been consulted as counsel as to the matter in suit, did not sit in this case.

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dence, a deed dated April 1, 1842, executed by the Loan Commissioners, conveying the lot in question to the defendant, stating the same to have been on a sale made at the time advertised. This deed was objected to on several grounds, not necessary to be enumerated, because there was no proof of the non-payment of the interest. The defendant then rested.

The plaintiff then proved that only one of the Loan Commissioners was present at the sale; that the lot was struck off to R. Van Rensselaer, as the highest bidder, who signed his name to the prescribed terms of sale in the commissioner's minute book, which were fifteen per cent. at the sale, and the balance on the 1st of April, 1842. That afterwards Van Rensselaer struck out his name in the minute book, and inserted the name of the defendant, who was not present at the sale. There was some other testimony given, which does not bear upon the case as reported. The plaintiff requested the judge to charge the jury, that the sale made on the first Tuesday of February, 1842, by the Loan Commissioners to Robert Elder was void, because :

1st. Only one of the commissioners was present at the sale.

2d. Because the premises were struck off to Van Rensselaer, who signed the agreement at the sale, but no agreement at the time was made with the defendant, or signed by him, and afterwards the premises were conveyed to him.

3rd. Because the terms of sale were fifteen per cent. cash, and the balance on the first day of April. The act of 1837 only authorizes the commissioners to sell for cash.

The judge refused so to charge, and directed the jury to find a verdict for defendant, to which the counsel for the plaintiff then and there excepted.

The plaintiff moved for a new trial on a bill of exceptions.

*W. Rutherford*, for the plaintiff.

*H. F. Clark*, for the defendant.

BY THE COURT.—SANDFORD, J. Several questions were

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argued, which it is unnecessary for us to discuss in connection with the motion for a new trial.

There are two grounds upon which the defendant is entitled to recover :

1. By the thirtieth section of the act relating to the State deposit fund, (Laws of 1837, c. 15) the mortgagor is thereupon barred and foreclosed if he does not pay the annual interest at the time it becomes due. The Loan Commissioners become "seised of the mortgage" in the lands mortgaged, and the mortgagor is thereupon barred and foreclosed. He is permitted to retain the possession of the premises until the commissioners' sale, prescribed by the act, but he must pay the mortgage and costs before the time when the premises will revert to, and re-invested in the State. (§ 30, 33.)

The mortgage was produced on the trial, and the payment of the interest due in October, 1841, was proved. There was no proof of the payment of the interest in 1842, but there was competent evidence to show that the interest was not paid, if any such proof were necessary. It is the duty of the commissioners to keep back of the mortgage a minute of every payment made, and such security. (§ 28.) The mortgage was not paid, and the payment of the interest in question was not proved. Presumptively the fact of its non-payment was proved.

The direct and necessary consequence of the non-payment of the interest twenty-three days from the first Tuesday of the month, was that the title in fee to these premises vested in the State. The act is so rigorous, that it leaves no room for doubt. The title in fee to the estate in the mortgagor or his assigns was not proved, and the title proved title out of the plaintiff, and she was entitled to a verdict. This was sufficient to enter a verdict, without in any manner connecting the title with the outstanding title.

2. The second ground of defence is that the deed was not sufficient, with the addition of the deed from the State. The deed was sufficient, at least, to

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**Hoyt v. Lynch.**

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ant the money due upon the mortgage. The interest on the mortgage was in arrear, and the mortgagees were entitled to foreclose, or to sell under the statute. The defendant, therefore, occupies the position of a mortgagee in possession of the premises mortgaged; the money secured being due and unpaid. Although since the revised statutes, a mortgagee cannot obtain possession at law, on default of payment, there is no doubt that he may retain the possession until redemption, if he succeed in procuring it by the mortgagor's consent, or in any lawful mode.

In placing our decision upon these grounds, we do not intend to intimate any doubt as to the sufficiency of the defendant's title under the sale and deed of the loan commissioners. We leave that subject untouched.

Motion for a new trial denied.

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**HOYT v. LYNCH.**

In order to test the credibility of a witness called to prove the plaintiff's demand, it is competent to show by him that a transfer of the establishment in which the demand arose, made by him to the plaintiff, was a sham and fraudulent sale, and thus that the witness is really interested in the demand in question.

The evidence is admitted to impeach the witness, not to impeach the plaintiff's title to the demand.

An order drawn at the foot of a bill rendered for services done, expressing a sum certain as due by the debtor in such bill, on a third person, requesting him to pay the bill, and charge it to such debtor, is a *bill of exchange*, which, by the statute, must be accepted in writing.

Jan. 23; Feb. 24, 1849.

**ASSUMPSIT** on an order drawn upon the defendant, with the common counts. At the trial, it appeared that Smith & Woglom, builders, erected certain buildings for the defendant, in Williamsburgh, in 1847. The plaintiff claimed to have tinned the roofs and put up the gutters for those buildings, and his bill



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The defendant's counsel then asked the witness—"What was the price and in what did you receive your pay, when you sold out to the plaintiff?"

This question was objected to by the plaintiff's counsel, and the objection sustained by the judge.

Defendant next asked—"Were you not at the time of the sale to the plaintiff notoriously insolvent?"

This question was objected to by the plaintiff's counsel, and the objection sustained by the judge.

The defendant's counsel here offered to show by this witness, that the sale by the witness to the plaintiff was a sham and fraudulent sale. To this the plaintiff's counsel objected, and the judge sustained the objection.

The counsel for the defendant duly excepted to all these decisions.

Further evidence was given in the cause on both sides, which it is not necessary to state. It was shown that Smith & Woglom failed January 10th, 1848, and gave up their contract, without having completed the buildings.

The defendant moved for a nonsuit which was denied; and the cause was ultimately submitted to the jury, who rendered a verdict for the plaintiff.

The defendant moved for a new trial.

*S. M. Meeker and J. E. Cary*, for the defendant.

*J. M. Van Cott*, for the plaintiff.

BY THE COURT, OAKLEY, CH. J.—We will first examine the question upon the admissibility of the evidence ruled out on the cross-examination of Harris.

The objection to this evidence was taken and presented to us, as if the action must fail, if fraud were proved; and in that aspect of the matter, the decision at the trial was right. But it manifestly appears that the inquiries made of the witness had another object, viz., to show that Harris was the owner of this demand, notwithstanding the assignment; that the money, if recovered, would belong to him; and thus to show an inter-



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est of Harris in the demand, such as the jury would regard in estimating the weight of his evidence. He proved the defendant's promise to pay the order, and his credibility was very material to the plaintiff's case. In this view of it, we think the questions ought to have been allowed by the judge. The answers sought would not have impeached the plaintiff's title to the demand, although they might have forced him to prove it by another witness. On this ground, there must be a new trial.

There was another question argued, which must arise on a new trial, and it is right that we should express our views upon it at this time. It is said that the order upon which the suit is founded, is a bill of exchange, and that there is no written acceptance of the same.

On consideration, we have come to the conclusion that this is a bill of exchange. It is an order in writing, drawn by one party on another, requesting the latter to pay a certain sum of money to a third party, at all events; depending upon no contingency, and payable out of no particular fund. It comes within the reason of the statute requiring a written acceptance to charge the drawee. It is true this order is not negotiable, but that is not necessary to make it a bill of exchange.

New trial granted.

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WYMAN v. SMITH.

Where a debtor remits money to a third person, with directions to pay it to his creditor, and the latter, upon being informed of it, calls upon the remittee, who then positively promises to pay such money to the creditor, it is a valid promise, and will support an action in favor of the creditor.

Such a promise is not a promise to pay the debt of a third person, and is not therefore within the statute of frauds. It is a promise to pay money which the defendant had received for the use of the plaintiff, and is consequently binding.

January 24; February 24, 1849.

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Wyman v. Smith.

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THIS was an action of assumpsit brought to recover of the defendant the amount of a bill of clothes, which had been sold by the plaintiff, a merchant tailor, to Clement Smith, a brother of the defendant, on the 17th day of July, 1844. The bill amounted to \$44 75. The declaration contained the common counts. The plea was the general issue. The cause came on for trial before SANDFORD, J., and a jury, on the 13th of June, 1848.

Upon the trial, the sale and delivery of the goods to Clement Smith was proved. Two clerks in the employ of the plaintiff testified to having called several times upon the defendant in reference to the bill, in the course of which interviews, the defendant admitted that he had received the money from his brother, (who resided in Alexandria,) with which to pay the bill, and that he promised to pay it. This was in the spring of 1846.

On the part of the defence, it was shown by the clerk of the defendant, that he was present at one of the interviews between the defendant and one of the plaintiff's clerks, when the defendant declined paying the bill, and said it was not his; and that he also was present at an interview between defendant and the other clerk, but did not hear defendant promise to pay the bill. The witness also testified, that he kept all accounts between Clement Smith and the defendant in the year 1846, and that all funds received from the former were applied to the payment of drafts which the defendant had accepted for him; that Clement Smith never forwarded money for the payment of this account, to the knowledge of the witness; that the accounts between Clement Smith and his brother were generally about square, but that in May, 1846, and up to January, 1847, there was a balance due to the defendant from his brother. The balance due to him in May was \$5000 or \$6000. The defendant also read in evidence, a deposition of Clement Smith, taken under a commission, in which he testified that in the spring of 1846, he was indebted to the defendant, for advances made for him; that on the 20th of May, he remitted to the defendant \$79 85, and on the 4th of June, \$44 90, and on the 12th of June, \$100 25, in payment of part of the balance due the de-



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Smith had remitted the money to the defendant for the purpose and with instructions to pay the bill, which the defendant received, and that the defendant had thereupon promised the plaintiff to pay it, and had omitted so to do, then the plaintiff was entitled to a verdict; but if the promise to pay the bill was made without any remittance of the money for the purpose from Clement Smith, or without having the funds for the purpose, the plaintiff could not recover.

It is contended that the finding of the jury is so decidedly against the weight of evidence, as to call for our interference on that ground. We think not. The testimony of Bennett and Joseph Wyman is strong enough in support of the verdict, to save it from being disturbed on the ground that it is against the weight of evidence. According to their testimony, the defendant admitted that he had received the money from Clement Smith to pay the bill; that it was not then convenient, but that he would pay it; that he should have paid the same when he had the money, but that he would pay. It is true that Clement Smith, in answer to the sixth interrogatory propounded to him, says, that he never remitted to the defendant any funds to pay the bill of the plaintiff, or any bill of his whatever. The jury, it seems, took the defendant at his admission, as stated in the evidence of Bennett and Wyman. And we cannot, consistently with well established rules on this subject, molest their finding, merely because we might possibly have come to a different conclusion, had we sat in their stead.

Was the charge of the judge correct? In *Weston v. Barker*, 12 John. 279,) Thompson, J., says, "If A. deliver money to B., to be paid over to C., the latter may recover it of B., in an action for money had and received." That case was not as strong for the plaintiff as the present. There, the defendant received from Bowen & Robbins, on the 4th of March, 1811, two policies of insurance in trust, to pay certain specified debts, and the balance to be held subject to their order. The defendant on the same day accepted the trust. On the 15th of the same month, Bowen & Robbins, being indebted to the plaintiff, gave him an order on the defendant for such balance; of which notice was, about the same time, given to the defendant. The defendant after

wards received the amount due on the policies, and after paying the demands specified in the declaration of trust, held in his hands a balance, for which the suit was brought; and it was held, that the plaintiff might maintain an action for money had and received to recover such balance. There was not, (as in this case,) an express promise to pay the money to the plaintiff; and this, with Spencer, J., who delivered a dissenting opinion, seemed a conclusive circumstance against the plaintiff.

The defendant contends, that this is a promise to pay the debt of a third person; and that, not being in writing, it is void. We regard it, not as a promise to pay the debt of a third person, but as a promise to pay money which the defendant had received for the use of the plaintiff, and therefore binding. In *Berly v. Taylor*, (5 Hill, 577,) Cowen, J., asks, "Was there ever a doubt contained in any case, that where money was handed to B. for the use of C., the latter may have an action for it, especially when he consents to the trust?" Again, at page 585, he puts the following case: "A man receives money from A., with directions to pay it over to B.; is it possible, that his converting the money to his own use before B. demands it, shall defeat the claim of the latter?"

The case of *Brind v. Hampshire*, (1 Mees. & Wels. 365,) has been pressed upon us by the defendant's counsel. That was an action of trover for a foreign bill of exchange, drawn at Honduras. A., a resident abroad, remitted the bill to B., his agent in England, drawn by A. and specially indorsed by him to the plaintiff, with whom his children were at school, in payment of the plaintiff's account for their board and education. B., the defendant, got the bill accepted by the drawee, and sent a letter by *post* to the plaintiff, stating that he had received a commission from A. to pay her some money, on account of his children, and desired to be informed when and how it should be delivered. While the bill was in the defendant's hands, he received directions from A. to keep it, and the proceeds in his hands, and to have a fair investigation into the plaintiff's accounts, and after such investigation, to pay her what might be due to her. No such investigation took place, and B. detained the bill. It was held, that the plaintiff could not recover in an

action of trover. That case turned upon a principle which has no application to the present. There, the remitter of the bill, before it was handed over to the plaintiff, countermanded the order to deliver it to her; and the court held, that the direction to hand over the bill to the plaintiff remained countermandable by the remitter, until it was executed, either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gave the latter a right of action against the former. The defendant then was regarded as the agent of the remitter of the bill, and had done nothing except to write to the plaintiff on the receipt of the bill, that he had received it, stating the purpose for which it had been remitted to him. If the defendant had collected the amount of the bill from the acceptor, had never received any countermand from the remitter, and, after the receipt of the money, had promised the plaintiff to pay to her the amount so received by him for her purposes; and if the plaintiff had then brought her action for money had and received, instead of trover, there would have been a most decided similitude between that case and the present; and then, to use the language of Parke, Baron, in that case, "There would have been a binding engagement between the agent and the remittee, which gives the latter a right of action against the former." This indispensable engagement was there wanting.

In *Williams v. Everett*, (14 East, 582,) there was no assent on the part of the defendant to hold the money for the purposes mentioned in the letter accompanying the remittance, but, on the contrary, an express refusal to do so. A privity must be established between the plaintiff and defendant, as to the subject of the demand—an assent to execute the trust which the remitter has confided to the remittee; and this assent must be an express or implied promise to the person to whom the money is to be paid; and if the remittee, after receiving the money, (it never having been recalled by the remitter,) promises the person for whose purpose he received it, that he will pay it over to him, we cannot but regard it as a valid promise, and one sanctioned by the *best* of considerations.

In *Seaman v. Whitney*, (24 Wend. 260,) there was no promise

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on the part of the defendant to pay the plaintiff the proceeds of the draft which he had received for that purpose, and therefore, as Justice Nelson says, "It was, at most, an attempt by a creditor to seize upon a fund placed by his debtor in the hands of a third person, with directions to apply it to the payment of a debt, without any communication with the creditor or understanding between them to that effect." Here, on the contrary, there was a communication between the defendant and the creditor, and an express promise from the former to the latter, and therefore it comes within the view of the same judge, when he says, "That in all cases, the principle on which the action must be maintained, if at all, is that the fund had been appropriated by an understanding between the debtor and creditor, assented to by the defendant; or by an express undertaking of the defendant with the creditor, at the request of the debtor, or both." But in *Seaman v. Whitney*, the debtor was the depositor of the fund, for which the suit was brought. He placed the funds in the hands of an agent, and subsequently withdrew them; and in this essential particular, that case is also different from the present.

On the whole, we conclude that where a debtor remits money to a third person, with a direction to pay it to his creditor, and the latter, upon being informed of it, calls upon the remittee, who then positively promises to pay such money to the creditor, it is a valid promise. From and after such promise, the relations of the parties are changed. The remittee ceases to be the mere agent of the remitter, liable to have the fund withdrawn from his hands by the countermand of the latter. Thenceforth, he is the depositary of the creditor's money, holding it for his use, and liable to him for it.(a)

The motion for a new trial must be denied.

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(a) In *The Delaware and Hudson Canal Co. v. The Westchester County Bank*, (4 Denio, 97,) it was decided, that an action might be maintained on a promise made upon a valid consideration by the defendant to a third person, for the benefit of the plaintiff, though the plaintiff himself was not privy to the consideration. Thus, where G. & S., being indebted to the plaintiffs, placed a bill of exchange in the hands of the defendants for collection, who, upon consideration thereof, under-

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Lay Grae v. Peterson.

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LAY GRAE v. PETERSON and WIFE.

The declarations or admissions of the wife, are not competent testimony to sustain a suit against husband and wife, for the debt of the wife while sole.

Though the cause of action spring from the wife's act or right, her statements respecting it are inadmissible in a suit against the husband or affecting his rights, except where she acts as his agent, and then they are governed by the principles applicable to agents.

Feb. 9th ; Feb. 24th, 1849.

APPEAL from an assistant justice's court. Lay Grae sued Peterson and wife for money lent to the latter while sole. The only evidence in support of his claim, was the admission of the fact by the wife, after her marriage. The defendants objected to the evidence, but it was received by the court, and a judgment thereupon rendered in favor of the plaintiff. The defendants appealed.

*J. A. Ruthven*, for the appellants, cited 1 Halsted's R. 366 ; 6 T. R. 680 ; 3 Ves. & B. 165 ; 7 T. R. 112 ; 2 Nott & M'Cord, 374 ; 2 Dana, 303 ; 2 Alabama, 339 ; 8 Porter, 351 ; 3 Iredell, 27 ; 16 Vermont, 560.

*E. C. Delavan and A. Thompson*, for the respondent, cited 10 John. 47 ; 7 T. R. 350 ; 1 Campb. 189 ; 9 Wend. 238 ; 13 Wend. 273 ; 9 John. 112 ; 1 Cowen & Hill's Notes to Phill. Ev. 86, and cases cited.

BY THE COURT. SANDFORD, J.—This point does not appear to have been decided in this state, but there is no doubt about it in principle. The action is really against the husband, and the wife's statements are no more evidence against him than are those of a stranger. Where a wife acts as agent of her

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took to collect it, to pay the amount when collected to the plaintiffs in satisfaction of their debt against G. & S., and the defendants had collected the bill ; it was held, that the plaintiffs could maintain an action against them on that promise.





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Erwin v. Smaller.

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## ERWIN v. SMALLER.

A wife cannot be compelled to appear and be examined as a witness in a suit against her husband.

The code of procedure allowing a party to call the adverse party as a witness, has not affected this principle, which proceeds not on the ground of interest in the suit, but on the ground of its leading to the interruption of domestic harmony and confidence.

Feb. 17 ; Feb. 24, 1849.

APPEAL from an assistant justice's court, where Erwin sued Smaller for money lent to his wife. At the trial, Erwin called the wife of Smaller as a witness, who was objected to by S. as incompetent, and she refused to be sworn. Erwin then moved to strike out S.'s defence. The justice decided that she could not be compelled to testify against her husband ; denied the motion to strike out, and gave judgment in favor of Smaller.

*J. H. Ehle*, for the appellant, cited the Code of Procedure, § 344, 347, 351.

*G. Defendorf*, for the respondent.

BY THE COURT. OAKLEY, CH. J.—The only point in the case is, whether a wife can be compelled to appear and be examined as a witness against her husband. We are clear that husband and wife cannot be witnesses either for or against each other, on grounds of public policy appertaining to the domestic relations. The objection does not arise from interest in the event of the suit ; but from the interruption which the allowance of such a practice would produce in the domestic harmony of the parties, and in that confidence which ought to exist in the marriage relation. The justice was clearly right, and the judgment must be affirmed.(a)

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(a) See *Burrell v. Bull*, 3 Sand. Ch. R. 15.

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Wetmore v. Campbell.

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## WETMORE v. CAMPBELL.

The corporation of the city of New York, under the statutes regulating the making of sewers, paving the streets, &c., may execute the work at its own expense, and then make an assessment of the expense upon the property benefited, for the first time after the work is completed.

The circumstance, that the street commissioner in contracting for the making of a sewer, stipulates with the contractor that he shall not receive payment until the assessment laid for the purpose shall be collected, does not affect the power of the corporation to make the assessment after the sewer is completed.

The election of the corporation as to making an estimate and assessment first, and making the sewer afterwards, or first making the sewer, and then laying the assessment, is determined by actually proceeding to execute the work before making an assessment.

The corporate liability to pay the contract price, is, in such case, incurred to the contractor.

The statutes do not authorize the collection of such an assessment from an occupant of premises benefited, who has not been assessed as such occupant by name.

The authority to the corporation to appoint a person to receive the assessments, and if not paid, to levy the same by a distress warrant, is a plain authority to issue the warrant to the collector appointed to receive them.

Where a collector, by virtue of an assessment warrant, levied upon the goods of a person not named in the warrant nor liable to pay the assessment, threatened to remove the goods, and gave him notice he would sell on a day specified, if he did not previously pay; it was *held*, that payment made when the collector was about to remove the goods for sale, was not voluntarily made, and that the collector was liable in trespass.

Feb. 12th; Feb. 24th, 1849.

THIS was an action of trover, for an iron safe and other articles of office furniture. At the trial on the 4th of January, 1849, the following facts appeared.

The defendant on the 22d of May, 1848, levied on the goods in question in possession of the plaintiff, at his office, in the building No. 4, South William-street, in the city of New York. He gave written notice that he had levied, and would sell on the 1st of June, unless the amount demanded was previously paid with costs. On the 31st May, he went to remove the property, and as he was about to remove it, the plaintiff paid him the amount claimed and costs, to prevent the sale of the property. The levy was made by virtue of a warrant issued to the defendant, dated

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April 19th, 1848, under the hands and seals of the mayor and four aldermen of the city of New York, commanding him to demand and receive from the several persons named in the annexed list, or return, or who may occupy the premises, the sums of money set opposite their names; being the money assessed to them, for building a sewer in South William-street, to the sewer in Broad-street, which sum they have neglected or refused to pay, together with the interest and expenses thereon. And upon neglect or refusal of payment, the warrant authorized and required him to levy these sums of money with interest and expenses, by distress and sale, of the goods and chattels of the persons so assessed, and named in the annexed list: or those who may occupy the premises, and neglecting or refusing to pay the same; returning the overplus money (if any there should be) after deducting the sum or sums so assessed, with such interest and expenses, and the charges of distress and sale to the person, so assessed, or to his or their legal representatives.

It further appeared that an ordinance of the corporation of the city of New York, was enacted August 5th, 1847, that a sewer be constructed in South William-street, from the sewer in Broad-street to William-street, under such directions as shall be given to the street commissioner, and one of the city surveyors. And that three persons named be, and they were thereby appointed to make an estimate of the expense of conforming to the provisions of the ordinance, to make a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion as nearly as might be, to the advantage which each might be deemed to acquire.

The street commissioner thereupon entered into a contract on behalf of the corporation, for the construction of the sewer, dated October 7, 1847, by which it was to be completed by the 7th day of November ensuing; and it was stipulated that the contractor should not be entitled to demand or receive payment for any portion of the work or materials for the sewer, until the money should be collected on the assessment to be laid for that purpose.

The assessors took their oath as such on the 17th of December, 1847. Their estimate and assessment were made subse-

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quently, and was confirmed by the two boards of the common council, Feb. 1, and approved by the mayor, Feb. 2, 1848. It was in the form of an estimate of the expense, specifying *contract, surveying, inspecting, collecting and advertising*, with a gross sum inserted against each head, and thereupon assessing the same on the property benefited. The store and lot No. 4 South William-street, were assessed in these words:—"Description of property, store and lot; Map No., 13; Ward No., 1614; Owner, J. Brown; Occupant, E. L. Bolles; Feet front, 18 f. 6 in.; Area square, 966—\$77 88."

From the inspector's certificate, it appeared the work was completed on or before the 24th Dec. 1847.

The estimate and assessment were made by taking the contract price and the expenses incurred. The course of the street commissioner, under such an ordinance is, first, to advertise for proposals to build the sewer. These are examined by him with the committee of the common council on roads, &c., and the contract given to the lowest responsible bidder. Then the contract is made out, and signed by the street commissioner and the contractor, in conformity to the proposal. The assessment on lot No. 4, South William-street was regularly demanded of the agent of the owner before the warrant issued, and from the plaintiff before the levy.

A verdict was taken for the plaintiff, subject to the opinion of the court.

*R. Mott and J. E. Cary* for the plaintiff.

*Willis Hall*, (Corporation Counsel,) for the defendant.

BY THE COURT. SANDFORD, J.—The principal point involved in the decision of this case, is the validity of an assessment for building a sewer, made for the first time, after the completion of the work. It is contended by the plaintiff, that the assessment, for the payment of which his property was seized by the collector, was invalid, because it was not made before the sewer in question was constructed, and before any contract was made for its execution.

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The general principles on which the plaintiff relies, are well settled and indisputable. The authority for making and collecting the assessment, is to be proved, and cannot be presumed or intended; and each step in the process, must be shown to have been regular, and conformable to the statute conferring the power. The grant of power under which sewers are made, streets are regulated and paved, and many other improvements are effected, which are indispensable to the comfort and health of a great city, is to be found in the act of 1813, entitled, "An Act to reduce several laws relating particularly to the city of New York, into one act," (2 Rev. Laws, 342, 407.) The one hundred and seventy-fifth section, in substance enacts, that the corporation of the city may cause common sewers, &c., to be made in any part of the city, and may cause estimates of the expense of conforming to their regulation for making such sewers, to be made and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion to the advantage which each shall be deemed to acquire.

The corporation is to appoint suitable persons to make every such estimate and assessment, who are to make the same after being duly sworn, and certify the same to the common council, and being ratified, the assessment becomes conclusive upon the owners and occupants, and a lien on the lots assessed. The common council is further authorized to appoint a person to receive the same, and the owners or occupants are declared liable to pay their respective assessments to him; and in default of payment, a warrant issues, to levy the same by distress and sale of the goods of such owners or occupants. The section provides, that the money when paid or recovered, "shall be applied towards making such sewers, &c."

The next section of the act, (§ 176,) authorizes the corporation if it appear on the completion of the sewer or other work directed to be made, that a greater sum of money had been expended in making the work than the sum estimated and collected, as before provided; to cause a further assessment equal to the excess, to be made and collected in the same manner. And if the sum actually expended, prove to be less than the

sum estimated and collected; the surplus is to be returned to the persons from whom it was collected.

The defendant relies upon the inference derived from these two sections, together with the first section of the act of May 14th, 1841, amending the act of 1840, relative to the collection of assessments, &c., in this city. (Laws of 1841, ch. 171, page 143.) As to the latter, it does not appear to us to throw any light on the question, whether the assessment ought to be made before or after the completion of the work.

Its scope and object are, to enable persons assessed to induce the assessors to mitigate or take off their assessment, not to oppose and defeat the construction of the work for which the burthen is imposed. This is shown by what ensues after the objections are presented. The assessors either alter their assessment, and then all the effect and end of the statute directing notice is accomplished, or they decline to alter it, in which event they are to present the objections with their assessment to the common council, for their action. If the common council confirm it, that is the end of the matter. If the assessors alter the assessment so as to meet the views of the persons objecting, the altered assessment is presented to the common council without the objections, and is confirmed as a matter of course.

Again, the ordinance directing these improvements, is enacted and becomes a law, before any step can be taken under the 175th section towards making the estimate and assessment. Whatever may be the result of the assessment, the work itself is to be executed, unless the ordinance be repealed, or the municipal authorities take it upon themselves to nullify it. If one assessment, on being presented for confirmation, be returned to the assessors for correction by the common council, it is their duty to make another; and to proceed until one be made, which the common council will confirm.

The notice under the act of 1841, it is therefore quite obvious, was not intended to elicit objections to a proposed improvement or public work. We understand, that in addition to the official publication of the proceedings of each board of the common

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council, a very reasonable opportunity is in practice presented for interposing such objections, by the notices published by the street commissioner, giving information of the application to the common council for the construction of all public works of this description, pursuant to the seventeenth section of the city ordinance regulating his department.

If any person interested wish to oppose the making of the improvement, his course is to satisfy the board before which it is pending, or the committee to which it is referred, that the expense of the undertaking will exceed its benefit; or present such other reason as he may have for his objection. The board or the committee, if there be any doubt, may direct an estimate to be made, or resort to any other measure for their information; but all this, to be effectual, should precede the ordinance.

To return to the act of 1813, it is a direct inference from the provisions stated, that the estimate and assessment for a sewer should be made before entering upon its construction, although the advantage of such a proceeding may not be quite so apparent; and if there was no other enactment on the subject, it would remain to inquire how the omission affects the validity of the assessment.

We are referred by the defendant's counsel to the two hundred and seventieth section of the same act, which authorizes the Corporation, in all cases where they may "deem it necessary for the more speedy execution of the said by-laws or ordinances, or any of them, to cause all such works as may be necessary for any of the purposes aforesaid, to be executed and done at their own expense, on account of the persons respectively upon whom the same may be assessed;" and to levy the same by distress and sale of the goods of the owners or occupants of the property assessed, or to recover the assessment by action. The next section makes the amount so expended by the Corporation, an incumbrance on the houses and lots assessed.

These sections are found under the head of "*Additional powers granted to the Corporation,*" commencing with section 266 of the act of 1813. Section 267 gives to the Corporation power to make by-laws and ordinances for filing, draining and



regulating sunken, damp or unwholesome grounds, yards or cellars ; for filling water lots on the river fronts, and for making bulkheads and filling slips, and the like. The 269th section authorizes the Corporation to cause the expense of such works to be estimated and assessed in the same manner as is directed in that act with respect to regulating the public streets.

It is argued on the part of the plaintiffs, that sections 270 and 271, are confined to the cases of sanitary regulation, authorized by the previous sections, where the public health requires speedy action, and do not extend to any other public works or improvements.

As to this argument, the authority is not in terms so restricted, and we are not at liberty to assume that such was the intention of the legislature. The discretion to cause the work to be executed at the corporate expense is unlimited, unless it is confined by its immediate connection with the 267th section, to the class of works authorized by that section. We need not consider the point, because the act of February 21st, 1824, (Laws of 1824, ch. 49, page 39,) was passed for the express purpose of removing all doubt on the subject. By the first section of that act, it is enacted, that the two hundred and seventieth section shall apply to all and every law, ordinance, order and direction, which the corporation is authorized to make, under and by virtue of the general act of 1813, or of any other act of the legislature. That section 271 shall in like manner apply thereto, and the assessments for the expense of the work ordered to be executed, may be made as directed in the 175th section of the same act, and may be enforced as is mentioned in the act of 1824.

The effect of these several statutory provisions, is to authorize the corporation, whenever an ordinance has been adopted for the construction of a sewer, or similar public work, to pursue either of two courses.

First, they may have an estimate and assessment of the probable expense made, confirmed and collected ; and then proceed to the execution of the work. Or, second, they may execute the work at their own expense, and after its completion and the

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actual cost is ascertained, they may assess the same with the charges, upon the houses and lots benefited, and collect such assessments as before.

In reference to the first mode, as no preliminary estimate made in good faith, will, in one instance out of twenty, correspond precisely with the result of the actual expenditure, in nineteen cases out of twenty, there will have to be either a second assessment made and collected to supply the deficiency; or a surplus will have to be returned to the parties assessed. The corporation would never undertake the burthen of seeking out such parties to refund their proportions; many of them would never hear of the surplus; the rights of others would be transmitted by death, insolvency or assignment, so as to make the collection of their proportions difficult or embarrassing; and the practical effect of the system would be, that all the original estimates would be with a wide margin to cover contingencies, and in order to avoid a second assessment, a surplus would be collected almost invariably, and a large portion of it would remain in the city treasury, either uncalled for, or the occasion of perplexing claims.

Such, it appears to us, will be the legitimate consequence of pursuing the mode derived by inference from sections 175 and 176 of the act of 1813. The other mode, in terms, requires the corporation to execute the work at their own expense in the first instance. No greater liability is incurred in the one mode than in the other. In both, the corporation is to be fully indemnified by the assessment. The difference is, that in theory, the money in the one case is collected and in hand, before the occasion for disbursing it arises; while in the other case, the corporation advances the entire expenditure, and is subsequently reimbursed.

In its actual working, the former mode would be difficult, if not impracticable; giving to the plaintiff's argument its full weight, and assuming that *all* the assessment must be "*paid or recovered*," before the work can even be contracted. In most of the city improvements falling within the 175th section, the assessments are in part imposed on vacant lots. These, in many instances, (we might safely say, in most instances,) cannot be

collected of the owner personally. The only remedy is to collect them by the slow process of a sale of the lands assessed under the statute; and in the meantime the improvement, which has been ordered because of its present necessity, is deferred for an indefinite period.

We have traced these consequences of the two different modes of procedure permitted to the corporation, not because the inconveniences of the one, or the advantages of the other, can bend or control the statute, or authorize us to infer a power not definitely granted; but because they exhibit the object of the legislature in the passage of the act of 1824, and warrant us in giving a fair and liberal construction to its provisions.

Much stress was laid upon the necessity and importance of an estimate, as distinguished from the assessment. We have seen that the importance of the *estimate*, properly so called, precedes the passage of the law or ordinance. After the work is decreed to be made, the assessment making a just apportionment of the burthen, becomes the only material point of interest to the parties concerned.

There is no force in the plaintiff's argument that section 270 of the act of 1813, merely changes the time of collecting the money, and does not refer to the time when the assessment shall be made. If we were to construe that section by itself, we could not hold that it required a conjectural assessment to be made before entering upon the work, which was not to be collected until the work was completed and the expenses all paid. The act of 1824 is, however, perfectly clear on this point. It is not the estimated cost, but the expense actually incurred with the interest, which is to be assessed on the owners or occupants.

Next, it is urged that in the case at bar, the corporation has manifested no intention to proceed under the 270th section, and the act of 1824. On the contrary, it is said, that instead of having the sewer constructed at their own expense, they expressly stipulated that the contractor should not receive any payment until the money should be collected on the assessment laid for that purpose.

1st. As to the intention manifested. The ordinance in ques-

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tion requires the construction of the sewer under the directions of the street commissioner and one of the city surveyors, and appoints the street commissioner and two others to make the estimate and assessment. It is not questioned that it is the duty and the province of the street commissioner, to make all contracts for the construction of sewers; and he made the contract in this case. Thus, he and the assessors were clothed with all the discretion which could be exercised by the corporation, in adopting the one or the other of the modes for making the assessment which we have considered. They adopted the course of building the sewer first, and making the assessment after it was completed.

The common council confirmed the assessment, and thereby ratified what had been done. Hence, there is no doubt as to the intention of the corporation, to pursue the authority conferred by section 270 of the act of 1813, in connection with the act of 1824.

2d. But it is said, they have not constructed the sewer at their own expense; which means, they have so contracted as to avoid advancing the money; and it is alleged that the necessary effect has been to enhance the cost of the work. This may be, and probably is, the effect in some small degree, although we have no proof of it; and the enhanced expense we suppose, is not much greater than a second assessment would occasion. The same consequence would ensue from another and legal course, which we will presently mention; and the argument *ab inconvenienti*, is neither very forcible, nor peculiar to the obnoxious proceeding. We ought also to observe that the work was advertised, and the proposals received, without the qualification which appears in the contract.

Our view of the matter is this. The jurisdiction of the corporation, is not to be determined by the circumstance of actual or constructive payment. The election to proceed in one mode or the other, is determined by actually proceeding to execute the work before making an assessment. The corporate liability to pay the contract price was in this case incurred to the contractor. He had no claim or demand against any other person, natural or artificial. If the corporation should fail to make an

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assessment, and collect it in a reasonable time, or if from any cause, they should proceed irregularly, so as to fail in making a valid assessment, the contractor would be enabled to recover the value of his services, notwithstanding the restriction in the contract, upon his demanding payment.

Suppose the corporation had agreed to pay the contractor in one year after date, with interest from the time fixed for the completion of the work; would any one doubt that an assessment could be made and collected after the work was done? Yet there would be no actual advance of money, and in respect of enhanced cost, the operation would be more open to observation than the contract made in the case before us.

This shows that the time and manner of defraying the expenses, when the corporation proceed under the 270th section, is not a test of their power to make an assessment. The statute does not restrict the corporation to any particular mode or form of liability; it does not require payment in cash during the progress, or at the completion of the work; and it does not preclude the use of the corporate credit, either in an absolute or a qualified liability.

If there be any undue or injurious latitude allowed by the act to our municipality, the legislature must correct it. We cannot find in its supposed existence, a warrant for the narrow construction put upon the 270th section by the plaintiff's counsel. If the mode and terms of payment adopted, be calculated to increase the expense, it may furnish a reasonable ground for objecting before the assessors to the imposition of the whole amount upon the property benefited. But we are satisfied that the validity of the assessment, the power to make any assessment, cannot depend upon the fact of payment by the corporation to the contractor, so long as they have the right, either to assess and collect the probable expense first, and then execute the work, or to execute it first and assess and collect afterwards.

If in the former mode of proceeding, the corporation should, after collecting the money, execute the work upon a long credit, the parties who have paid the assessment would have no redress; and if a further assessment became necessary, the improvident use of the funds first collected, would not affect or

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impair its validity. And if the latter mode be adopted, it suffices for the parties interested, that an ordinance has directed the construction of the work, the work has been completed, and they are not responsible in any mode to the builders.

It is important to such parties, as well as to all who are interested as tax payers in the city expenditure, that sound discretion, good judgment, and rigid economy, be exercised in contracts for the public works and expenses of all kinds; but the disregard or omission of all these qualities, cannot affect the jurisdiction of the corporation to impose and collect the taxes and assessments authorized by law for defraying such expenditures.

Each party refers us to the adjudged cases, as sustaining his view of the law on this question. We do not find any reported cases in which it has been considered in connection with the act of 1824.

In *Elmendorf v. The Mayor, &c., of New York*, (25 Wend. 693,) the application was for the allowance of a certiorari, to review certain assessments for regulating and paving streets, and it was refused because of the lapse of time. The motion was made at the special term before Nelson, Ch. J., who, in noticing some of the points raised against the validity of the assessments, declared his opinion that an estimate should have been made before the work was commenced, but that an assessment could be made even at that day; that there was nothing in the act of 1813, making it expressly, or of necessity, a condition precedent.

In *Doughty v. Hope*, (3 Denio, 249,) it was decided at the circuit, that the assessment was void, because it was made after the improvement was completed, instead of its being made before the work was commenced. This decision was reversed by the late supreme court, which held, that although the estimate and assessment ought to precede the improvements, upon the construction of sections 175 and 176 of the act of 1813; yet the statute is in that respect directory to the corporation, and the omission to pursue it, did not invalidate the assessment. The case was finally decided in the court of appeals, on other grounds. (3 Denio, 594.; 1 Comstock's R. 79.) It stands as

the direct adjudication of the late supreme court, to the effect that an assessment, like the one before us, is valid, independent of the act of 1824, and the 270th section of the act of 1813.

We are not aware that there has been any different ruling in the present supreme court, and if there had been, we should necessarily have conceded to the former court the meed of authority. We were induced to give the subject a full examination upon the construction of all the statutes, irrespective of the adjudications, because of its magnitude, and the variety of interests involved; and our conclusion is clear, both on principle and authority, that the assessment in question was legal and valid.

The next point of the plaintiff is, that he was not assessed, and there was no authority for collecting the assessment of him. It appears that in the assessment roll, J. Brown is described as the owner, and E. L. Bolles as the occupant of the store and lot, in respect of which the assessment or charge collected of the plaintiff was imposed. The warrant under which the defendant levied, directed him to collect from the several persons named in the assessment list, "*or who may occupy the premises.*" The plaintiff was an occupant of the lot assessed.

Does the statute authorize the collection from an occupant, who has not been assessed as such by name? The expense of the improvement is to be assessed among the owners or occupants of the houses and lots benefited. As we understand it, this can only be done, as to occupants at least, by describing them as such in the assessment list, and designating them by name. So the assessors, in this instance, appear to have understood the law, and they assessed Brown as owner, and Bolles as an occupant. When confirmed, the assessment becomes binding and conclusive on the owners and occupants of the lots charged; of course, upon the owners and occupants designated in the rate or list so confirmed.

It would be absurd to say, that it becomes binding and conclusive upon a tenant who first comes into the occupation after the assessment has been confirmed. The law might be so framed as to include all future occupants, but so far as we have now traced its provisions, it clearly does not embrace them.



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Then, as to the subsequent proceedings, "such owners and occupants," are declared liable to pay upon demand, and in default of payment, the warrant issues to levy the assessment by distress of the goods "of such owner or occupant." We think this clearly means, the occupant assessed, as such in the list by name, and not any person not named, who may chance to be occupying the premises when the collector visits them.

The authority to issue such a roving distress warrant, may be granted, if the legislature deem it necessary; but it cannot be established by remote inference, still less from its expediency in a given case. Under the statute in question, it is incumbent on the assessors to ascertain the names of occupants, if it be intended to resort to them for payment. If they are not inserted in the list, the assessment must be collected from the owner, or from the land. In *Doughty v. Hope*, before cited, it was held at the circuit, that a warrant like this could not issue against an occupant not named; and the supreme court acquiesced in that opinion, although the point was not decided. The inconvenience to an outgoing tenant, assessed as occupant, which has been suggested, is no greater than the inconvenience which may occur, on the defendant's construction, to one who comes in long after the assessment has been confirmed, and who never hears of it till his goods are seized by the collector. The former, in theory at least, has notice of the making of the assessment, and can protect himself under the 175th section of the act of 1813.

The warrant, in our judgment, went too far in directing the collector to distrain upon occupants who were not named in the list; and as this defect appeared on its face, it constitutes no defence to the collector for levying upon the plaintiff's goods, within the principle of the authorities cited in behalf of the defendant.

It is said, that the defendant was not a public officer, authorized to execute the warrant. We think this criticism is too refined. The statute authorizes the corporation to appoint a person to receive the assessments; and if not paid, to levy the same by a distress warrant. The intention is plain, that the warrant should issue to the collector. If otherwise, it must



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issue to some person, and the collector is eligible to perform the duty.

The defendant contends that the action cannot be sustained because the payment was justly due from the plaintiff, it was voluntarily made, and no trespass was committed. The facts are, that the collector levied on his goods by virtue of a warrant against other persons, issued for a debt, which he was under no obligation to pay; threatened to remove the property, and gave him written notice that he would sell it on a specified day, if he did not previously pay the demand. The plaintiff paid it when the collector was about to remove his property for sale. We have no doubt that the defendant is liable in trespass.

The plaintiff is entitled to judgment on the verdict, on the ground that he was not named in the assessment list as occupant of the store and lot assessed.

Judgment accordingly.

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CONNER v. THE MAYOR, ALDERMEN and COMMONALTY of the  
CITY of New York.

The act of December 10, 1847, in relation to the fees of certain officers in the city of New York, is neither a private nor a local act, within the meaning of the 16th section of the third article of the constitution, which provides that no private or local bill shall embrace more than one subject, and that shall be expressed in the title.

An officer may be local, in the sense and for the purposes of that provision, and yet a statute respecting the duties and fees of his office may be public and general. When an office is created by the constitution, and the terms and salary thereof are defined, the people, in their sovereign capacity, may, by a new constitution, terminate both, without regard to the rights, the interests, or the expectations of the incumbent.

An office created by law may be repealed by law, without regard to the term or future salary of the officer entrusted with its exercise.

Offices created by the constitution, the tenure and compensation being fixed by a statute, are equally within the legislative control, as to such tenure and compensation, except that the office cannot be virtually abolished by a colorable reduction of the compensation, or by taking it away altogether.

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There is no *contract*, express or implied, between a public officer and the government, whose agent he is. Nor have public officers any proprietary interest in their offices, or any *property* in the prospective compensation attached thereto, whether it be in the shape of salary or of fees.

A public officer is an agent, elected or appointed to perform certain political duties in the administration of the government. The legislative power which prescribes his duties and provides a compensation, may alter the duties at pleasure. It may increase them without enhancing the compensation ; and, in like manner, it may diminish the compensation without lessening the duties.

If the officer receive fees, the legislature may abolish same, reduce others, or take away all, and compensate him by a salary. His right to the emoluments of the office is held subject to all these modifications.

And the legislature, in substituting a salary for fees, may continue the fees, and direct them to be paid by the officer into the public treasury.

An act requiring the fees of an office to be paid into the public treasury, is not unconstitutional on the ground that it imposes a *tax*, without specifying the object to which the tax shall be applied.

The duty of pronouncing a statute unconstitutional, is always one of great delicacy ; and courts should not exercise that grave function, except where the point is entirely clear. Per SANDFORD, J.

Jan. 25, 26 ; March 10, 1849.

THIS was an action of assumpsit upon the money counts and an account stated : the plea was the general issue.

At the trial, the evidence for the plaintiff was as follows :— At a general election in the state of New York, at which certain officers were to be elected for the city and county of New York, held on the 3rd of November, 1846, the plaintiff was elected clerk of the city and county of New York, for the period of three years, from the 1st day of January, 1847. The plaintiff duly qualified himself for the office by giving the necessary security for the performance of its duties, and by taking the oath of office prescribed by law ; and on the first of January, 1847, he entered upon the duties of the office, and continued from thence to perform, and has ever since performed the same. On or about the 18th day of March, 1848, the defendants demanded of the plaintiff the payment to them of the fees, emoluments and earnings of the office so held by the plaintiff, which had been earned and received by him before January 1st, 1848, and afterwards. And on or about the same day, the Board of Supervisors of the city and county of New York,

passed a resolution, in substance, that the District Attorney be directed to take immediate measures to have the matter submitted to the grand jury for their action.

On or about the 25th day of March, 1848, a complaint was actually made to the grand jury then sitting for the city and county of New York, against the plaintiff, in accordance with that resolution. Afterwards, on the 27th day of March, and on the 20th day of April, 1848, the plaintiff paid to the defendants the sum of \$10,000 for the fees, emoluments and earnings of his office from the first day of January up to the first day of April, 1848, protesting, at the same time, in writing against the legality of such demand of payment, as follows: "Paid under protest, and through a threat of criminal prosecution by the Board of Supervisors," and also taking a receipt for the fees, &c., on the payment of the same, from the Chamberlain of the city and county of New York, to which receipt was affixed a protest to the same effect as above set forth. It was agreed, and understood at the time of making this payment, that it should not prejudice the rights of the plaintiff.

The evidence on the part of the defendants, consisted of an act of the legislature of the state of New York, passed December 10, 1847, entitled "An act in relation to the fees of certain officers in the city of New York," read from the laws of the state for 1847, p. 560. This act provided that all the fees, perquisites, and emoluments of the surrogate, county clerk, register, and certain other officers, for all official services rendered by them respectively, should belong to, and be for the benefit of, the city and county of New York, and should be collected by them, and paid over to the city treasury, and that the officers named should receive salaries in lieu of the fees, which salaries were fixed by the act, with a privilege to the Board of Supervisors of increasing them \$500. Under this statute the salary of the plaintiff was fixed at \$2,500 per annum. It was also made the duty of the several officers named in this statute, to keep an exact account of all the fees received by them, a transcript of which was to be transmitted to the comptroller once a month. In case any officer referred to in the act, should receive to his own use, or neglect to account for in such mode

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as the Supervisors might direct, any fees, perquisites or emoluments, or should neglect to render to the comptroller the account provided for, or to pay over the same, he should be adjudged guilty of a misdemeanor and punishable with a fine or imprisonment, and in addition thereto, should forfeit his arrears of salary, and be liable in a civil action for the moneys received, and not accounted for and paid over. The defendants also read an ordinance adopted by the Board of Supervisors, pursuant to the foregoing act, fixing the salaries to be allowed to the officers named in the act, their deputed and clerks, and among others, that of the plaintiff, as clerk of the county, which was fixed at \$3000 per annum. It was admitted, that notice of this ordinance was given to the plaintiff, and that he had been allowed and paid a salary out of the fees, &c., of his office, since the first of January, 1848, at and after that rate; the plaintiff, however, protesting, on the receipt of the same, against such allowance, and against the fact of his receiving the same being taken as an assent to the constitutionality of the law of Dec., 1847, so far as it relates to him. The plaintiff insisted that the statute was unconstitutional and void, and wholly inoperative, and he objected to the reading of the same, to show that the fees of office of the plaintiff were the property of the defendants, or that they thereby became entitled to demand and receive the same.

A verdict was taken for the plaintiff, by consent, for \$10,000, subject to the opinion of the court, upon a case to be made, with liberty to either party to turn the same into a bill of exceptions.

*J. Van Buren and F. B. Cutting*, for the plaintiff.

The act entitled, "An act in relation to the fees and compensation of certain officers in the city and county of New York," passed December 10th, 1847, c. 432, is unconstitutional, because :

- (1.) It violates art. 3, § 16 of the constitution, which provides that no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.

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(2.) It deprives the plaintiff of his property without authority and without compensation.

I. The office of clerk of the city and county of New York is created by charter, and secured by the constitution.

II. It is not necessary to argue that the legislature have no power, for great governmental purposes, to raise, diminish, or abolish the fees of this officer; to substitute a fixed salary for fees, or to abolish the office altogether, because the act in question does neither of these.

III. The fees, perquisites and emoluments, of the clerkship of the city and county of New York, are the absolute property of the plaintiff.

IV. The act in question takes the property from the plaintiff, and gives it to the defendants, which the legislature have no power to do. (*Taylor v. Porter, &c.*, 4 Hill, 140.)

V. If the legislature would otherwise have such authority, the constitution of the United States prohibits its exercise.

*J. M'Keon and Willis Hall*, for the defendants.

I. The office of clerk of the county of New York is a public office, made by public authority for public purposes. (2 Black. Com. 36.)

The history of the office as given, shows it to have been considered a public office like the mayor and aldermen, and subject to legislative control. (*People v. Warner*, 2 Denio, 272, 279. Kent's Charter, p. 22, secs. 12, 15, p. 71 to 72, secs. 27, 29, p. 166.)

Under the old constitution and the revised statutes, it was considered a public office. Under the head of public officers, the clerk of New York, the register and surrogate, were enumerated. (1 R. S. 99.)

Under the new constitution, the clerk is made eligible by the people. He is placed in the same category with district attorneys and sheriffs, and other public officers.

The fees of clerk, of register, and surrogate, are regulated with other public officers, as judges and others. (2 R. S. 229, 731.)

II. Public officers in this country, are mere public agents, and

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have no private property in their offices. (*State v. Dewy*, R. M. Charlton's Georgia Rep. 397.)

The powers, duties, privileges and emoluments of public officers, are subject at all times to the action of the legislature, except when expressly prohibited by the constitution.

III. The act of December 10th, 1847, is a legitimate exercise of the right of the legislature to regulate the duties and emoluments of a public officer.

IV. The power of a legislature to control even private charters, is unquestioned. (11 Peter's Rep. 11 Leigh's Rep. 3 Kent's Comm.; 3 Sandf. Ch. R. 625.)

In this state, the legislative power to control certain constitutional offices, is admitted. (*Ex parte McCollum*, 1 Cow. 550.)

V. In the case of the clerk of the county, the charter has frequently been affected by legislative enactments. (Kent's Charter, 166.)

VI. The power to alter fees has been recognized by the supreme court and court of errors. (*People v. Warner*, 7 Hill, 81; 2 Denio, 272.)

VII. The act of December 10th, 1847, is correct in its title, and conforms to the constitution.

The case of *Philip Walker*, (3 Barb. S. C. R. 162,) which arose out of the act in relation to police justices. (Laws of 1848, p. 249.)

The law of 1847, creates a charge on the city, and makes an appropriation of public money. It is, therefore, within the provision of the constitution requiring a vote of two thirds.

VIII. To declare an act unconstitutional, there should be no rational doubt. The presumption is in favor of the constitutionality of the law. (3 Dallas' Rep. 394; 4 Wheat. 625; 1 Cow. 550.)

IX. There is, in this country, no property in an office. (6 S. & R. 322; 9 Rep. 37.) Nor is there any contract between the government and the officer, in respect to it.

BY THE COURT. SANDFORD, J.—The plaintiff claims to recover the fees payable by law, for the services rendered in his office, and received by the treasurer of the city since the first

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day of January, 1848, on the ground that the act of December 10th, 1847, conferring those fees on the city and county, and providing the clerk with an annual salary, is unconstitutional. Two objections are made to the validity of this statute.

*First.* It is said, that it violates the provision of the constitution, which provides that "no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title. (Art 3, § 16.) The duty of pronouncing a statute unconstitutional, is always one of great delicacy; and courts should not exercise that grave function, except where the point is entirely clear. The decision of such cases becomes more than usually difficult, when the objection rests upon the forms of legislative action. If we should be satisfied that this act is not in compliance with the constitution, in the matter alleged, we then encounter another embarrassing question, what is the consequence upon the validity of the statute? Is it all void, or is so much of it valid as is not private or local, or is fully expressed in the title?

We have no doubt, in the first place, that this act is not a private act. Then is it local? It relates to the city and county of New York, embracing nearly one-sixth of the population of the state. Perhaps the extent of the city is not, of itself, a decisive criterion. But testing it by taking any county in the state. Is a statute which relates to a whole county, local? Certainly such an act is not within the mischiefs which this provision of the constitution was intended to remedy. It was aimed at "log-rolling," a well known process by which bills to promote individual interests, and mere neighborhood projects, often at the expense of the people of a county at large, were combined together in order to aggregate a sufficient number of votes to carry them all through the legislature.

We may not be at liberty to repose our judgment on the fact, so obvious in this particular instance, that the act is one which was calculated to enlist against its passage a formidable combination of individual and personal interests. But having regard to the objects of the act, which are as public in their nature as any conceivable legislation falling short of the whole state, and considering the very serious difficulties and embarrassments

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which would grow out of a decision that statutes affecting this city are local acts ; we do not feel warranted in holding, that the act in question is local, within the meaning of the constitution. We observe several statutes of great public importance, enacted the same year, which are obnoxious to the same objections ; but their validity has never been doubted.

As to the analogy derived from the language of the constitution in speaking of "local officers," an officer may be local, in the sense and for the purposes of that provision, and yet a statute respecting the duties and fees of the same office may be public and general.

We have looked into the statute before us sufficiently to say, that if it be a local act, it is not so clearly repugnant to the provision in the constitution, as to call upon us to declare it invalid for that cause. The subject is the fees and compensation of county officers. In effecting the requisite changes, the act necessarily treats of some matters incidental to the discharge of the duties for which fees are to be exacted from one class of persons, and compensation made to another. This can scarcely be said to constitute a distinct subject.

So in regard to the expression of all the subjects in the title. It cannot be requisite to mention in the title of the act, the various details which are necessary and yet incidental to carrying out the principal subject intended. Such a practice would make the title so voluminous, that it would cease to be a title, in its proper sense.

Upon the whole, we repeat that we do not find sufficient force in the reasons urged against the validity of this act, to pronounce it unconstitutional, on the first ground maintained in behalf of the plaintiff.

The next point of the plaintiff is, that the act in question is unconstitutional ; because it deprives him of his property, without authority, and without compensation. The fees, perquisites, and emoluments of the clerkship of the city and county of New York, (it is argued,) are the absolute property of the plaintiff.

The plaintiff's right to the clerkship is reposed on the charter of the city and the constitution of the state.

The history of this clerkship is very well stated in the



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opinion of the chancellor, in *Warner v. The People, ex rel. Conner*, (2 Denio. 272,) and we will therefore advert to it very briefly.

In Gov. Dongan's charter, granted to the city in 1685, the corporation was authorized to have, among other officers, a *town clerk*, which office was conferred by the charter upon John West. His duties were not defined, except that he was to execute all things which belongs unto that office. In a subsequent part of the charter, West was declared to be constituted and appointed to be the present town clerk, clerk of the peace, and clerk of the court of pleas, to be holden before the mayor, recorder, and aldermen. (Kent's City Charter, 9, 12, 17.)

In Governor Montgomery's charter, January 15th, 1730, there was granted to the city to have, among other officers, *one common clerk*. A court of general sessions, and a court of record of pleas, (which was afterwards called the mayor's court,) were conferred upon the corporation; and the mayor, recorder, and aldermen were made justices of the peace. Section 29 again granted a common clerk, with the powers and duties of common clerks of boroughs in England, who was to be clerk of the court of record, and clerk of the peace and the general sessions. The charter appointed William Sharpas to the office for life, and reserved the power of appointment to the governor of the province. (Kent's Charter, 42, 73, 74.) Before this period, by the act of October 3, 1710, (1 Van Schaack, 82,) deeds and conveyances were permitted to be recorded in the office of the secretary of state, or in the county records. Under this act, the town clerk, and after 1730, the common clerk of the city, which was then co-equal with the county in territory, recorded deeds and conveyances.

Thus, it will be seen, that for nearly half a century before the constitution of 1777, the duties of the common clerk of the city of New York were those now performed by the clerk of the common council, the clerk of the oyer and terminer and general sessions, the register of deeds, and the clerk of the city and county. The officer whose duties are now most nearly coincident with those usually performed by the ancient common clerk, is unquestionably the clerk of the common council. The

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constitution of 1777, while it sustained all existing charters to bodies politic, gave the power of appointment which in those charters was reserved to the governor, to the council of appointment, and made the tenure of this office to be during pleasure. (Art. 23, 28, 36.) After the resolution, a great many new duties were imposed upon the clerk of the city and county, in common with other county clerks, by various legislative acts; and we may here remark, that the constitution of 1846, and the legislation under it, have essentially changed the functions of the office. Its most important duties at this time, are those which, till July, 1847, were performed by the registers and clerks of the court of chancery and the supreme court. This last and most essential change, has occurred since the plaintiff was elected, in pursuance of the constitution adopted at the same time that he was chosen.

To return to the history of the common clerk, it is true that in the statutes divesting him of his functions, from time to time, he is described as the clerk denominated in the charter the common clerk, now usually called the clerk of the city and county of New York; but it will be seen that the resemblance was at last nearly annihilated. On the 27th of March 1807, the clerkship of the common council was taken from the clerk of the city and county by the legislature, and the appointment vested in the common council. (5 Laws of New York, Webster's Ed. 91.) On the 11th of March, 1808, the legislature created a new clerkship of the oyer and terminer and general sessions of the peace in the city and county of New York, taking the former from the clerk of the supreme court, and the latter from the clerk of the city and county. (5 Ibid. 265.)

The first general compulsory recording act in this city, (Laws of 1811, 6 Webster's, 184,) directed the conveyances to be recorded in the office of the clerk of the city and county, where deeds for the purpose of evidence had been recorded for a century before, and where bargains and sales were required to be recorded by the act of 1810; but in the revision of the laws in 1813, the office of register of deeds was carved out of the county clerkship, and the duty of recording deeds, conveyances, and

registering mortgages, was imposed upon the register exclusively. (2 R. L. 402, § 159.)

By the city charter, the common clerk was the clerk of the peace. By an act passed April 9th, 1811, regulating the police of the city, the special justices, with the mayor's approval, were authorized to appoint an assistant clerk; (6 Webster's Laws, 290;) and in the revision of 1813, the police office was expanded, and this officer became the clerk of the police. (2 R. L. 350, § 24.)

Finally, the constitution of 1821, provided that the clerks of counties, including the clerk of the city and county of New York, should be elected by the people in their respective counties, and hold their offices for three years. (Art. 4, § 8.)

In process of time, the court of pleas of the city underwent an entire change, so that long before the plaintiff's election, the charter officers of the city ceased to act as judges of that court, and instead of the mayor's court, it became the court of common pleas, and in its civil jurisdiction, is no longer founded upon the charter.

The result of this historical inquiry, is to show that the clerk of the city and county of New York, became an officer appointed by the state government at the revolution; by the constitution of 1821, he became elective by the electors of the city; that by the gradual progress of legislation, in part at the instance of the municipal authorities, and where otherwise, acquiesced in and unquestioned, the duties of the common clerk of the charter (whose name the clerk of the city and county enjoyed for a time, as a synonym,) were distributed among several new and distinct officers; and in 1846, the clerk of the city and county, had become an officer deriving no authority from the city charter, performing no duty exclusively under its provisions, and indeed, performing under the statutes, fewer of the duties, which, by the charter, belonged to the common clerk, than were in 1846 performed by either the clerk of the sessions, or the clerk of the common council. He has not inherited the name of the clerk of the charter, much less his tenure or his functions. In 1846, he was a county clerk, not a municipal officer, under the charter. Except that he was not clerk of the

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circuit, the oyer and terminer, or the sessions, and could not record deeds and mortgages, he was in every respect like the county clerks of the other counties in this state. We must, therefore, lay out of view the city charter, and all the vested rights supposed to be derived from that instrument.

The remaining branch of the plaintiff's general proposition is correct; this clerkship was and is secured to the incumbent by the constitution of the state. We regard the plaintiff as holding an office under that instrument, secured to him for three years, beyond the control of the legislature—an office, of which the duties and emoluments are defined and regulated by law. It was determined in our highest court, in *Warner v. The People*, (2 Denio, 272,) that the act of 1843, taking from the plaintiff his duties and emoluments as clerk of the common pleas, was unconstitutional and void, because those duties appertained to the office of clerk of the city and county, and were part of the latter; not so much because the act infringed on the plaintiff's vested rights, as because the new officer was to be appointed by the court, instead of being elected by the people. (See the opinions, page 281, 284, 286, and in the supreme court, 7 Hill, 81.) If the act of 1843, had directed the new clerk to be elected by the people, we have no assurance that the law would have been adjudged invalid. The case of Warner therefore, does not aid us in setting limits to the power of the legislature, to control the duties and the emoluments of officers, who hold under a constitutional creation and tenure.

The plaintiff's propositions are as follows:

"II. It is not necessary to argue that the legislature have no power, for great governmental purposes, to raise, diminish or abolish the fees of this officer, to substitute a fixed salary for fees, or to abolish the office altogether; because the act in question does neither of these.

"III. The fees, perquisites and emoluments, of the clerkship of the city and county of New York, are the absolute property of the plaintiff.

"IV. The act in question takes this property from the plaintiff, and gives it to the defendants; which the legislature have no power to do.

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“ V. If the legislature would otherwise have such authority, the constitution of the United States prohibits its exercise.”

In considering these propositions, our first inquiry will be, what is the nature and the extent of the right in a public office, which is vested in the incumbent?

We were referred to several leading cases, deciding statutes to be unconstitutional which invaded private vested rights of property, or the chartered rights of corporations, which though operating extensively on public interests and public convenience, were nevertheless private corporations aggregate. The former proceeded, sometimes on the ground that the legislature, not having the omnipotence of the parliament in England, could not take the property of one man and give it to another, although there were no constitutional inhibition against such an act of tyranny; at other times, they have been placed on the provision in the constitution, that no man shall be deprived of his property without due process of law.

The decisions in the cases of corporations, *quasi* public, have had the further ground, that the contested statutes impaired the obligation of contracts, and thus infringed the constitution of the United States. In the most celebrated of them all, the Dartmouth College case in 4 Wheaton, the distinguished counsel who attacked the statute, drew, in pointed terms, the distinction between rights vested by such a charter in a private corporation, and those which were held by a public officer or a public corporation; and it is emphatically maintained by Chief Justice Marshall and Mr. Justice Story. And although the rights of private corporations, vest upon contract, and are thus protected, they must yield, when the great exigencies of the public and of the government require it; as is shown in the Charles River Bridge case, 11 Peters', 420; the Tuckahoe Canal Co., 11 Leigh, 42; and the Harlem Rail Road case, 3 Sand. Ch. R. 625. These decisions do not advance us in our inquiry as to the nature of the right in question. They may be analagous, if we find it to rest upon contract, or to constitute private property.

An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.

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(2 Black. Com. 36.) And a public officer, is every one who is appointed to discharge a public duty and receives a compensation for the same. (Per Best, Ch. J., in *Henly v. The Mayor of Lyne*, 5 Bing. 91.) Many of the ancient executive and ministerial offices, known to the English law, were inheritable and assignable, and were treated as incorporeal hereditaments. But judicial offices, and offices of trust pertaining to the administration of justice, could not be so held. (2 Black. 636; 9 Coke, 47, 48.) And the doctrine is limited in England to ancient common law offices, which depend chiefly upon usage. Those of modern origin, are governed by the statutes creating them, and confer no life estate or irrevocable tenure, unless expressly given. (*Smyth v. Latham*, 9 Bing. 692. And see Hardres' R. 356, 357, per Ch. Baron Hale.)

In this country, there are no inheritable offices, nor any depending upon ancient usages or customs. All public offices emanate from the people, and are governed by the constitutions and the laws. Their tenure is defined by the one or the other; and when no tenure is expressed, the officer holds during the pleasure of the appointing power. (See *Ex parte Henner*, 13 Peters', 230, 260.)

Public offices, in theory at least, are held and exercised for the benefit of the community, and not for the benefit of the incumbent, save as the compensation is incidental to the public service. Hence, it is only where the constitution defines the tenure, the mode of appointment, or the compensation, that the legislature is precluded from altering either, or from abolishing the office itself.

The case of *Warner v. The People*, (2 Denio, 272,) illustrates the force of the constitutional restriction in respect of the mode of appointment. *The People v. Garey*, (6 Cow. 642, affirmed in error, 9 *ibid.* 640,) decided, that where the constitution fixes the term of office, it cannot be shortened by a statute, directly or indirectly; and the same point was determined in Pennsylvania as to compensation when fixed by the constitution, in the *Commonwealth v. Mann*, (5 Watts & Serg. 403;) and in Arkansas, in *Ex parte Tully*, (4 Arkansas R. by Pike, 220.)

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On the other hand, where an office is created by a statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation, may be altered at pleasure, and the latter may be even taken away, without abolishing the office. Such extreme legislation is not to be deemed probable in any case, but we are now discussing the legislative power, not its expediency or propriety. Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference. (See 2 Peters' R. 412; 1 Baldw. C. C. R. 74.) As illustrating these principles, we will hereafter refer to several authorities in different states of the Union.

If the office itself be secured by the constitution, and the compensation be left to the legislature, it may be increased or diminished, so as to affect the incumbent, whether the compensation be by fees or by salary, as the public good may require. This was asserted in terms or in effect by all the judges who delivered opinions in the case of *Warner v. The People*, and is not contested by the plaintiff's counsel.

We have, therefore, these positions for our future argument. When an office is created by the constitution, and defined as to term and salary, the people in their sovereign capacity may, by a new constitution, terminate both, without regard to the rights, the interests, or the expectations of the incumbent. This was done in our constitution of 1821, and again in 1846, in respect of the judiciary; a branch of the government, which it has been the wise and uniform policy of our states and nation to render more independent than any other. In each instance, the judges were holding for unexpired terms, fixed by the former constitutions. An office created by law, may be repealed by law, without regard to the term or future salary of the officer intrusted with its exercise. Offices created by the constitution, the tenure and compensation being fixed by a statute, are equally within the legislative control as to such tenure and compensation; except that the office could not be virtually abolished by a colorable reduction of the compensation, or by taking it away altogether.

(This exception is a sufficient answer to the argument in  
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behalf of the plaintiff, that the act in question is in effect a removal from his office. It was not alleged, that the fees were not amply sufficient to pay all the salaries and expenses charged upon them by the act. The latter cannot therefore be subjected to the imputation of effecting an indirect removal, by destroying the compensation.)

Such being the nature of a public office, what is the right which the incumbent has in the office, or in the emoluments attached to it? The plaintiff treats this right as constituting *property*, in the sense in which we speak of private property; and contends, that he accepted the office, and entered upon its duties, under an implied contract, or a compact well understood, that he might hold and enjoy such emoluments during his official term.

It was said by the court, in one of the authorities cited by the plaintiff's counsel, that the right to exercise an office, is as much a species of property as any other thing capable of possession; and in an elective office, the election confers the right. (*Wammack v. Holloway*, 2 Alabama R., N. S., 31.)

In that case, this remark was rather a figure of speech than a judgment, determining an office to be property. It was a strong mode of expressing the right which one elected to an office has to hold and enjoy it, as against all intruders and unfounded claims; which is as perfect a right, beyond doubt, as the title of any individual to his property, real or personal. But the nature of that right, and its liability to control by legislative action, is quite a different thing. The supreme court of North Carolina has, however, decided that an office is the property of the incumbent, in a case which we will presently mention more at large. (*Hoke v. Henderson*, 4 Devereux's Law R. 1 and 17.)

To resume the argument; we think it must be assumed that there is no contract, express or implied, between a public officer and the government, whose agent he is. The latter enters into no agreement, that he shall receive any particular compensation for the time he shall hold office; nor in the case of a statutory office, that the office itself shall continue any definite period. Where the constitution limits the compensation, it is beyond legislative control; but that makes no contract. The



people have the control, in their sovereign capacity, as the legislature has in statutory offices. It is not the question whether fees or salary earned may be divested. The right to receive such fees may be conceded as perfect, without affecting the present inquiry.

On the part of the officer, there is still less in the nature of a contract. Whether he hold under the constitution, or a statute, he is under no obligation to continue to discharge his duties a single day. He may resign at any time, and no power of the government can prevent him. (*United States v. Edwards*, 1 McLean's R. 467.) The legislature may attach penalties to the refusal to serve in a public station ; but that does not affect the question.

Chief Justice Marshall, in the Dartmouth College case, (4 Wheat. 627, &c.,) said in substance, that public officers are not within the inhibition of the constitution of the United States against laws impairing the obligation of contracts ; that the inhibition does not extend to offices within a state for state purposes ; that the legislature must necessarily control such offices, and may change and modify the laws concerning them, as circumstances may require ; that grants of political power, to be employed in the administration of the government, are to be regulated by the legislature of each state, according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

In the same case, Mr. Justice Story said, " The state legislatures have power to enlarge, repeal or limit, the authority of public officers in their official capacity, in all cases when the constitution of the states respectively do not prohibit them ; and this among others, for the very good reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature."

Judge Story proceeded to compare the duty of a public officer to a naked power, which is revocable at pleasure.

In the *Commonwealth v. Bacon*, (6 Serg. and R. 322,) the mayor of Philadelphia denied the validity of a corporate law, enacted during his term, by which his salary was reduced, on

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the ground that his acceptance of the office created a contract between him and the city, that he should be paid the compensation then established, while his term continued. The court decided it was not a contract, and that the law was valid. In their opinion, the court say that services by a public officer do not partake of the nature of contracts, or bear any affinity to them; and that the allowance to the officer, whether it be annual, daily, or by fees, depends upon the will of the law makers. They refer to the constitutional inhibition in Pennsylvania against reducing the salary of the governor and the judges, (which is similar as to that as to judges in our constitution,) as showing that in all other cases, the legislature may change the compensation of officers whenever it is deemed just and expedient to do so.

In *Chenzeller v. The Union Canal Company*, (1 Rawle, 181,) the plaintiff had served as secretary of the company from 1816 to 1821. There was no specific term of office. In March, 1819, the legislature, by law, provided that no compensation should be thereafter allowed by the company to any of its officers, until its public works should be re-commenced. This had not been done, when the plaintiff sued for his salary to May 1821. It was decided that the plaintiff could not recover, as he was free to continue as secretary, or to withdraw, after the passage of the act.

In *Banker v. The City of Pittsburgh*, (4 Penn. State Rep. by Barr, 49,) the plaintiff had been appointed collector of tolls by the corporation of that city, with an annual salary, and was required to give an official bond. During his term, the city, by ordinance, stopped his salary, because the tolls yielded too little to make it their interest to proceed in the concern. The court decided, that there was no contract, express or implied, for the permanence of the salary, and that the plaintiff could not recover any compensation for the period subsequent to its discontinuence.

In *The People ex rel. Enloe v. The Auditor of Public Accounts*, (1 Scammon's R. 537,) where the legislature of Illinois, in July 1837, abolished the office of warden of the penitentiary to which the relator had been appointed for two years in Febru-

ary preceding, and the salary for the two years had been appropriated by law, he contended that he had a vested right to his salary for his whole term, and that the repealing act violated a contract, both of which objections to the act were overruled by the court. In respect to an office reposing on a constitutional tenure, the legislature may, by statute, require security to be given, on pain of the office being declared vacant. (*Treasurers of the State v. Taylor*, 2 Bailey's R. 524.)

In the case of *The State v. Dens*, (R. M. Charlton's Rep. 397 to 443,) Judge Nicoll in the superior court of Georgia, decided that an act of the legislature, taking away from a sheriff the custody of the jail and the appointment of a jailor in his county, and conferring it on a municipal corporation, was a valid act, and that it did not divest the sheriff of any proprietary right, nor impair the obligation of any contract. The judge examined the subject of the rights of public officers, with great ability, and more at large than it has been done in any case which has come under our observation. His argument leads inevitably to the results which he maintained—first, that public officers under our government, have no proprietary interest in their offices; and second, that there is no contract between them and the government, that their duties and the rights flowing from their discharge, may not be changed during their continuance in office.

The North Carolina case before mentioned, stands out in strong contrast to the Georgia authority, and indeed to every published decision and opinion on the subject which we have seen. It was there decided, that an act providing that clerks of the courts in the respective counties should be chosen at the ensuing election by the electors of such counties, was unconstitutional, because it displaced the clerks then in office, and who were holding during good behavior, under a prior act of the legislature. The clerks were recognized as officers in the constitution, but that instrument contained no provision as to their tenure, or their mode of appointment. The simple statement of this decision, will strike with surprise the mind of every person who has been accustomed to observe the legislation in this state on the subject of public officers.

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The supreme court of North Carolina, held, on the strength of the common law doctrine of offices, that the office of clerk was private property in the incumbent, to the extent of the emolument which he was entitled to receive from it; and was protected by the clause in the bill of rights providing that no freeman shall be deprived of his property except by the law of the land. That a statute which deprived one person of a right, and vested it in another, is not a law of the land. The court conceded in its argument, that it was competent for the legislature to abolish the office itself, to increase its duties and responsibilities, and to diminish its emoluments, as the general welfare might dictate; and that the office was to be deemed as having been conferred and accepted, subject to such regulation. But the court denied that the legislature could take the office from one and give it to another, which it held was the effect of the statute under advisement. It also denied that it was in the power of the legislature, after prescribing an official term, to alter or abridge it, so as to affect a person holding the office at the time of such alteration. 'This, it will be perceived, is not in accordance with the authorities heretofore cited.

It appears to us, with much respect for the learned tribunal which pronounced this judgment, that it was unduly influenced by the common law rule derived from prescriptive offices, and operating in a government whose genius and spirit are perhaps in no respect more unlike ours than in this very subject, the source and nature of the rights and interests acquired by public officers. In enumerating the qualities of an office, considered as property, the court admitted that it was inalienable, and in many instances incapable of being managed by a substitute; and in the only point giving it the semblance of value, subject entirely to legislative control. If to these be added, the consideration that it is a political agency, and not like a private contract of hiring for a definite period, we think that there will remain no incident of *property* in its correct signification.

Upon the whole, these authorities, with the nature of the duties and employments of a public officer, seem to us conclusive to show that such an officer has no *property* in the prospective

compensation attached to his office, whether it be in the shape of salary or of fees.

The same cases and the same considerations, are equally conclusive against the argument, that the officer's right to such future compensation is upheld by any *contract*, express or implied.

We have seen, that a constitutional officer, holds by a tenure independent of legislative control, so far as the constitution prescribes; but this is by force of the paramount public law; and the power which made the constitution, may control such office, at pleasure, regardless of supposed vested rights and implied compacts existing in favor of the incumbent. We have cited some strong illustrations of the like complete authority of the legislature over public offices which are created by statute; and we fully assent to the principle maintained by those decisions.

In our opinion, a public officer is an agent, elected or appointed to perform certain political duties in the administration of the government. The legislative power prescribes those duties, and gives to the officer such compensation for their discharge as is deemed just. The same sovereign power which prescribes the duties, may alter them at pleasure. It may increase them without enhancing the compensation. (*Andrews v. The United States*, 2 Story, 202.) In like manner, the same power may diminish the compensation, without lessening the duties. If the officer receive fees, it may abolish some, reduce others, or take away all, and compensate him by a salary. His right to the emoluments of the office, is held subject to all these modifications. All these consequences flow from the political character of the agency, and the supremacy of the government in regulating it for the public good.

The plaintiff's counsel conceding the power of the legislature to regulate fees, for great governmental purposes, deny that it can substitute a salary for fees, and at the same time continue the fees for the benefit of the city treasury.

We cannot find any good reason for this distinction. If the legislature may abolish some fees, and reduce the residue, and may substitute a salary for the fees, the power seems to embrace

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the whole interest of the officer in the subject matter ; and it can be of no consequence to him whether the fees continue to be paid, or to whom they are paid. He receives the proper reward for his services, graduated by the legislative discretion. It is difficult to perceive what further interest he has in the affair beyond that of every citizen.

It is true that the term *fees* properly signifies certain allowances to officers as a recompense for their labor and services. But we have had many instances of fees which did not come to the benefit of the officer for whose services they were paid. One of long standing, is that of the fees payable to the Secretary of State, which go to the treasury. The justices of this court, during the year preceding the code of procedure, were required to perform duties, for which fees to a large amount were received by the clerk, and paid to the treasury of the city. The constitution itself recognizes this class of fees, (Art. 6, § 20,) and shows, that although they are a compensation for official services, it does not follow that the state may not receive them, and recompense its agent in another mode and at a different rate

It will scarcely be questioned that the legislature now sitting, may create a special judge in this city, to have jurisdiction of writs of habeas corpus and certiorari, summary proceedings against fraudulent debtors, and the like ; for which he shall be entitled to demand the same fees that were formerly paid to justices of this court, such fees to be paid to the city treasury, and the judge to receive an annual salary from the city. And if this may be done in respect of a new office, why not in respect of one existing, in which the whole subject of fees and compensation is wholly within the legislative control ?

It is clear to us, that while the state may compensate by salaries, its officers concerned in the administration of justice, it may at the same time, require its citizens, who have occasion for the services of such officers, to pay certain fees for the same. This is simply paying an agent a gross sum, while those for whom he transacts the business of the state are required to pay to the state a fixed price for each service rendered.

In the case of the register of deeds, pending before us on

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nearly the same point, it is urged that the act in question imposes a *tax* upon citizens who may require these services; and it is unconstitutional because it does not specify the object to which the tax shall be applied. We do not perceive any resemblance to a tax, in these fees paid by citizens for the promotion of their private ends.

It is not necessary for us to notice all the extreme cases put by the learned counsel for the plaintiff. This statute does not transfer the fees to a stranger, or to a mere corporation. They are conferred upon the city and county of New York, a political community of nearly half a million of people, for the public benefit.

We have no evidence, nor indeed was it pressed, that the annual salary allowed to the clerk is illiberal; much less that it is so small as to cause him to vacate his office. Its apparent hardship consists in discontinuing during the residue of his term, the large remuneration attached to the office when he entered upon its duties. It is not our province to vindicate the propriety of legislation, which thus deprives an officer of great trust of the principal profits, which, relying upon the stability of the laws, he had good reason to expect would continue during his term, and upon the faith of which he may have relinquished valuable pursuits in order to take upon himself the discharge of its duties.

We might think it far more just, that such laws should be made to operate prospectively; but our duty is to declare the law, not to make or unmake it; and we feel bound to say, that we believe this act was a valid exercise of legislative power. There are numerous instances of similar statutes, of which we will mention some of the most striking.

In May, 1842, congress, by an act applicable to persons then in office, limited the compensation of district attorneys, marshals, and circuit and district clerks; and required them to pay the surplus of their fees, into the treasury of the United States. The district attorneys and marshals hold office for a term of years; and it is a well known historical fact, that the fees in this district of all the officers named, had for several years, amounted to many times the sums fixed for the respective sala-

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ries by the act. (Acts of Congress of 1842, ch. 29, § 1, No. 167.)

The district attorneys of the respective counties in this state were, until 1847, appointed for terms of three years. Yet a series of acts were passed by the legislature, commencing in 1838, by which in all but the smallest counties, those officers were deprived of their fees, and put upon annual salaries, amounting to far less than their former compensation; and such acts were applied to those then enjoying the appointments.

This course of legislation, and the acquiescence of the numerous intelligent and influential persons affected by it, tend to strengthen the argument in favor of entire legislative control, derived from the nature of public officers and their relation to the government.

Judgment for the defendants.

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SAMUEL OSGOOD v. SAME DEFENDANTS.

*E. Sandford*, and *N. B. Blunt*, for the plaintiff.

*J. McKeon*, and *Willis Hall*, for the defendants.

IN this case, there remains little to be said. The plaintiff can found no claim upon the city charter; for his office was first called into existence by the act of 1813. He was actually in office when the constitution of 1846 took effect, and it declares that he shall "*hold*" his office till the expiration of the term for which he was elected. (Art. 14, § 10.) By this we understand simply, that he was to have the office, as if there had been no change in our organic law. In other respects, his case is like Mr. Conner's and we must render the same judgment in favor of the defendants.



**CASHMERE v. DE WOLF and CROWELL.**

The courts of common law in the several states have jurisdiction to determine questions of salvage, in cases which, in other respects, are within the scope of their established jurisdiction.

The jurisdiction of the United States courts in admiralty over questions of salvage, is to that extent concurrent, and not exclusive.

A state court having law and equity powers, may entertain a suit to redeem property claimed to be held for a salvage lien, to enforce which salvage no suit is pending in admiralty ; and may restrain the removal of the property by injunction, appoint a receiver for its preservation and for its sale, where perishable, and ascertain the salvage liens and decree payment to the parties entitled.

January 27 ; March 10, 1849.

THE complaint in this cause was exhibited by Abdoolah Cashmere, of Bombay in Hindoostan, against Thomas Crowell and Thomas L. De Wolf. It stated, that in May, 1847, the plaintiff shipped on board a British ship, the Lady Kennaway, one case, containing six long and eleven square cashmere shawls, belonging to him, of the value of \$3500 to \$4000, to be delivered at the port of London to Forbes, Forbes & Co., as his factors. That during the course of the voyage, and on the 16th of November, 1847, within a short distance of the English coast, the ship was entered upon by the officers and crew of the British barque Reliance, whereof the defendant, Crowell, was master ; who with his officers and crew, under pretence of salvage, took from the Lady Kennaway, the plaintiff's case of shawls, opened it, wantonly damaged the shawls, and proceeded therewith, and with other goods taken from the ship, to the port of New York, contrary to the laws of England applicable to British vessels in such cases, which required the goods thus taken to be carried into England. That on the arrival of the shawls in New York, Crowell, in behalf of himself and his officers and crew, libelled the same upon a claim for salvage, in the district court of the southern district of New York, which libel was dismissed by that court on the 18th of July, 1848. The decree of dismissal recited that the goods were taken from the Lady Kennaway, on soundings, near the British coast,

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abandoned at sea, and the master and crew of the *Reliance* then took from her, and transported in their vessel to New York the goods claimed ; that when the *Reliance* fell in with her, another British vessel was lying near her, and had already boarded her, and such vessel was left there by the *Reliance*; and that the *Lady Kennaway* was afterwards taken into the port of Portsmouth in England ; that the ship and barque were owned by British subjects, and the libellants were also British subjects; and the matter having been argued by counsel, the decree declared that it rested in the sound discretion of the court, whether it would take cognizance of the matters in contestation, or would leave the parties to contest the same in their home tribunals. It thereupon decreed that the suit be dismissed, and the goods discharged from the arrest ; that on payment of the costs directed, the libellants might take the property out of the custody of the court ; and if they did not within twenty days resume its possession, the claimants might take it and carry it to its port of destination.

The complaint further stated, that Crowell and his officers and crew, have left this country, and the defendant De Wolf, claims the right to hold the shawls in their behalf, and is attempting to obtain possession thereof. The plaintiff believes those parties were not entitled to salvage ; or if they were, that their right has been defeated by their misconduct in respect of the goods. That the goods are in the possession of the United States marshal, but De Wolf has notified the marshal not to part with the same, because he intends to acquire the possession under the decree of the district court ; and the marshal refuses to give them up to the plaintiff or his agents. That De Wolf is now taking measures to obtain possession from the marshal. That De Wolf, Crowell, and the other pretended salvors, are persons of insufficient pecuniary means and responsibility, to answer for the value of the property. That the goods are of very delicate texture, and would be greatly damaged by being handled by persons not familiar with them ; are of value as articles of fashion and show only, and will be damaged by being retained by those interested in the sale thereof. That the plaintiff desires to have the claim to salvage thereon determined,

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and to pay the same if any be due, and in the mean time to obtain possession, on giving security for the salvage. He prayed for an injunction, and a receiver, that it might be ascertained by the court whether any salvage be due, and if there were, that he might be allowed to pay the same, and redeem his goods from the lien thereof; and for general relief.

The complaint was verified by Charles Rhind, Jr., the agent of the plaintiff; and thereon an order was made by one of the justices of the court, restraining the defendants from all proceedings to obtain the possession of the shawls from the marshal or from any other person.

The plaintiff now applies for a receiver, with the usual authority. The defendant, De Wolf, resisted the motion on affidavits. Crowel had not been served with process.

De Wolf stated, that the shawls claimed by the plaintiff were a part of 194 shawls, which were taken by Crowell, his officers and crew, from the *Lady Kennaway*, which they found derelict and totally abandoned at sea, in the Bay of Biscay, about 200 miles from land, with five feet water in her hold, and her rudder gone. Crowell's barque was on a voyage from Liverpool to New York. They saved the shawls from the ship, for the owners, and brought them to New York. Some of the shawls were wet with sea-water, when taken from the ship, but that no intentional damage was done to any of them by those in the barque.

On their arrival here, the goods were deposited in the public stores, under the custody of the collector of the port; and Crowell, in behalf of the owner and crew of the barque, immediately libelled the whole of the shawls for salvage, and the same were transferred from his custody to that of the marshal of the United States in this district. Crowell and his vessel and crew proceeded from here to Mobile, and thence returned to Liverpool. And all concerned in the salvage, and all the witnesses, are mariners, British subjects, absent from this country, and ever likely to remain abroad.

Upon the libel being dismissed by the district court, De Wolf, whom Crowell had constituted his agent and attorney, complied with the terms of the decree, so as to entitle him to the re-pos-

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session of the goods, and thereupon obtained an order of the court directing the marshal to deliver the same to the libellants or their agent. The marshal then made an order on the collector of the port to deliver the same to De Wolf. This was the day before the injunction was granted. De Wolf claimed that the goods when they arrived here, were lawfully in Crowell's possession, and subject to be retained by him by way of lien for the salvage; and on their discharge, were again, and still are in the possession of Crowell by De Wolf as his agent. That this court has no jurisdiction of the matter, it being a case of salvage belonging to the admiralty court; and also because Crowell is a non-resident, not served with process. That he, De Wolf, has advanced large sums in respect of the goods, for which he claims a lien. That his brother, John S. De Wolf, for whom he is also the agent, is the owner of the barque *Reliance*, and is worth over \$100,000, and he is himself abundantly able to answer for the value of the property in question. He denied all the bad faith and improper conduct charged, and said he intended to ship the property to his brother at Liverpool, there to be libelled for the salvage claimed.

*D. Lord*, for the plaintiff.

The defendant relies on the opinion of the supreme court in this district, in *Frith* against these defendants, reversing the decision of *Edmonds, J.*, at the special term. I am compelled to satisfy this court that the decision in *Frith's* case was wrong; and will undertake to show that this court may deliver the property to the plaintiff, taking from him security to pay any salvage there may be; and may then compel a settlement of the question involved.

The plaintiff's ownership of the shawls is not denied. The goods were taken at sea, on soundings, near the British coast, and another ship which had first boarded the abandoned vessel, was lying near. The defendants took them at sea, under the pretence of salvage. This is not denied. The alleged damages and injury are denied. The United States court refused to take jurisdiction of the case.

Crowell has only a constructive possession, and we have a

right to prevent his obtaining actual possession. The goods are fashionable articles, and necessary to be in the dominion of the owner. They are of delicate texture, and easily injured. The goods are saved for the benefit of the owner; and he is trying to have the benefit of them, paying all the salvors are entitled to.

I. The plaintiff is entitled on some terms, to the possession and disposal of these shawls, whenever he may deem it advantageous. He is entitled to some specific relief in the suit. The difficulty about the amount and extent of the lien, the peculiar character of the goods, and their situation, are elements of jurisdiction. The lien alone gives jurisdiction, if it be not exclusively maritime.

Then there is the insecurity of the defendants; the transitory character of the defendants. De Wolf is the mere attorney, and the plaintiff will have no remedy against him after he transmits the property to his principal. On this point of jurisdiction, I refer to *Crane v. Ford*, (1 Hopk. 114;) *Ridgway v. Roberts*, (4 Hare, 106;) which was the case of a ship; and *Glascott v. Long*, (3 M. & Cr. 451.)

We could obtain possession, and mean time have an injunction, if there were no salvage claim; that is very clear. The property is here; we own it. Can the defendant send it to sea, without our consent; we wanting its possession here?

II. The fact that the lien is for salvage, does not oust the jurisdiction of equity, or of a common law court. The salvor may retain the property for his lien, and put the owner to a tender, and then try it in the ordinary courts. He is not bound to go into Admiralty. (*Hartfort v. Jones*, 1 Ld Raym. 393.)

In *Baring v. Day*, (8 East, 57,) the amount of salvage was the sole question. *Newman v. Walters*, (3 Bos. & Pul. 613;) was an action by a salvor for his salvage. And see Abbott on Shipping, by Story & P., 556, 662. The difficulty arises in making a tender; because if it be one dollar too little, in the estimate of a jury, the plaintiff must fail in a suit at law for the goods. *Blake v. Patten*, (15 Maine, 173,) was an action by a sailor for his share of salvage against the master of the vessel, who had received it.

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Thus the common law courts have jurisdiction of questions of salvage, and they are not of exclusive admiralty jurisdiction. If prize be the question, there is no jurisdiction at common law. (Doug. 594; and *Norion v. Hallett*, 16 Johns. 328, following that case.) Political questions are involved in a question of capture.

The case of a marine trespass, is one of admiralty jurisdiction; clearly so. Yet the state courts have jurisdiction also. (*Percival v. Hickey*, 18 John. 291.) Courts of equity have jurisdiction of suits for contribution to a general average. They always had it formerly. So admiralty has it concurrently, on the ground of lien. So of seamen's wages. So as to the catchings, &c., of a whaling voyage; the parties may proceed in equity for the distribution.

Claims on charter party, and for freight, in this country, are enforced in admiralty. It was not so in England. In *Merchants Bank v. N. J. Steam Nav. Co.*, (6 Howard, 389,) this point was examined and considered.

The jurisdiction is concurrent in innumerable cases. This is not the case of a vessel touching while on her voyage; or of a seaman on board a foreign ship, and returning to his own country.

It is said, the constitution and the laws of the United States prohibit the common law courts from the jurisdiction claimed. But the Judiciary Act of 1789, expressly saves the common law remedy to suitors, the same as it existed in England at the revolution. The master of the vessel represents all the salvage claims.

If it were an exclusive jurisdiction, the United States court could not decline it. If it does decline it, most certainly, it is not exclusive in that court.

This court may retain the property, and direct the question of salvage to be settled in the admiralty court, or elsewhere. We are willing to give any security, so that we be not deprived of our goods. We are not bound to tender this salvage blindfold. The lien is not one arising from contract. It is vague and indeterminate. If this court have no jurisdiction, our goods are effectually taken from us, without any remedy.

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*J. W. Gerard*, for the defendant, De Wolf.

I. The question at issue in this cause, being purely one of the right and amount of salvage, for salvage services performed on the high seas, this court has no jurisdiction of the case ; but the jurisdiction of the district court of the United States is exclusive of that of the state courts.

We concede that in England, the courts of common law have jurisdiction of such questions in certain cases. It is made exclusive here in the admiralty courts, by the difference in the governments.

The constitution of the United States conferred this jurisdiction on the federal courts exclusively. There is no case or dictum to be found, either in the state or national decisions, to the effect that the state courts have any such jurisdiction. The contrary is fully established. (1 Peters' Admiralty Decisions, 81, 93 ; 1 Peters' R. 545 ; 1 Sumner, 400 ; 16 Johns. 327 ; Abbott on Shipp. by Story & Perkins, 663, note.)

The courts of common law are not competent to give the relief. They have not the adequate machinery. They cannot make all the necessary parties, or effect the distribution. Here were 194 shawls, and as many different owners might sue us for them, if the plaintiff is right. In admiralty the salvors may be witnesses for each other. Not so at common law. (Abbott on Shipp. 682, note.)

The prayer of this complaint, is to take away the salvor's lien, and substitute a bond—a mere personal remedy.

The counsel also cited 1 Wheaton, 304, 335 ; 1 Kent's Com. 318, 319 ; 18 John. 392.

II. The plaintiff is estopped by his acts and allegations in the salvage suit in the United States district court, from now asserting the jurisdiction of the state court. (14 John 134 ; 1 Cowen, 543.)

III. The decision of the United States district court is *res adjudicatæ* upon the questions, whether it is proper for the courts of this country to entertain jurisdiction of the matters in controversy, and upon the rights of the defendant to the possession and custody of the goods to be carried to England for adjudication, as is also the recent decision of the supreme court

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as to the question of jurisdiction, in *Firth v. Crowell*, on other goods taken from the same ship.

IV. If the propriety of the entertaining jurisdiction in these cases were an open question, and the court were to exercise their discretion upon it, they would not entertain their jurisdiction under the circumstances of this case, for the following among other reasons :

1. The plaintiff's representative defeated the adjustment of the whole controversy in the district court, by objecting to the jurisdiction of the courts in this country.

2. He is now taking exactly the opposite ground, and asserting what he there denied.

3. This court has not the machinery adapted to the determination of a salvage suit. It is not a matter of account ; but the proportions in which the salvage is to be distributed between owners, masters and crew, and even between different members of the same crew, rest in the discretion of the judge, and cannot be properly adjusted in this court. (*Novion v. Hallett*, 16 Johns. 327 ; *Percival v. Hicksy*, 17 Johns. 257 ; *Johnson v. Dalton*, 1 Cowen, 543 ; *Gardner v. Thomas*, 14 Johns. 134.)

V. The defendants were proceeding with due diligence to have the claim for salvage adjudicated. The question whether this court would not interfere or not, if they did not so proceed, therefore does not arise. But it is further insisted, that when the salvors should lie by, and thus detain the property from the owners, the remedy of the latter would be by action in the court of admiralty to recover possession of the property, or by tendering at their peril enough to cover the claim for salvage, and bringing an action of replevin.

VI. This being in effect an action to recover the possession of the shawls in specie, and in the nature of an action of replevin ; the plaintiff was bound to proceed in the form pointed out by the code of procedure, where the delivery of personal property is claimed ; and not having done so, the action must be dismissed.

VII. The action cannot be sustained, without making all the members of the crew of the *Reliance*, who are living, parties ; and they not being parties, no order affecting their rights can



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be made by the court. (1 Sumner's R. 400; Abbott' on Shipping, 678.)

VIII. The court has not jurisdiction of the persons of the defendants, one being a non-resident, and never having been served with process; and this not being an action for an injury to personal property, within the meaning of the code of procedure.

*Lord*, in reply.

There is nothing to oblige the defendants to take the goods to England. The plaintiff was not represented in the United States court. The counsel does not represent owners. He intervenes to preserve the property for the owners.

This court cannot decline jurisdiction, if it be concurrent, and its machinery is quite adequate to dispose of all the questions and rights involved. The constitution of the United States does not give exclusive jurisdiction in admiralty to the federal courts. It gave no specific maritime jurisdiction, and congress expressly reserved all that belonged to the state courts.

BY THE COURT. SANDFORD, J.—The defendant contends that this court has no jurisdiction, because the lien claimed by Crowell and his associates, is for salvage of a cargo, derelict at sea; and the jurisdiction is exclusively in the court of admiralty. It is not denied that in England, the courts of common law have concurrent jurisdiction with the admiralty courts, in determining questions of salvage; but it is claimed to be otherwise here, by force of the constitution of the United States and the Judiciary Act of 1789.

In determining this point, the relative convenience of the respective tribunals is not important. Jurisdiction depends on other and higher considerations.

Section nine of the Judiciary Act of Congress, which declares the authority of the district courts of the United States, clothes them with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of imposts," &c., "saving to suitors, in all cases, the right

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of a common law remedy, where the common law is competent to give it."

It is difficult to perceive why, under this important exception; when we had in this state in full operation, the same common law that governed in England, and like courts of law and equity, administering the same remedies, and in the same forms of proceeding, which were administered and used by the courts of law and equity there; the courts of this state did not retain precisely the same jurisdiction which the courts of common law in England exercised, concurrently with the admiralty court, prior to the American Revolution.

We are however referred to the recent decision of the supreme court in this district, in *Frith v. Crowell*, reversing an order of one of the justices of that court, appointing a receiver of goods taken by the same parties, at the same time, and under the same circumstances, with those in question here. That court refused to entertain jurisdiction, for the reasons, that it is not a proper tribunal to try a question of salvage, its forms of proceeding are inadequately adapted to it, it has never exercised such a jurisdiction, and the court of admiralty is the proper tribunal for that purpose.

This decision is not placed distinctly on the ground urged at the bar, that the admiralty court has exclusive cognizance of the matter; but rather on the novelty of the appeal to the supreme court; and its inadequate machinery to deal advantageously with such a case.

After carefully considering the question, we are constrained to differ from that learned tribunal, which we never can do without regret. And this unfortunate disagreement impels us to give our views more at large than we are wont on interlocutory applications.

The constitution of the United States, does not determine the point. It authorizes congress to create inferior courts and confer on them admiralty jurisdiction. Until congress exercised the authority, there was no interference with the state courts; and when the U. S. district courts were created, and their cognizance defined, their jurisdiction became exclusive, only so far as it was made exclusive by the act of congress. In all other cases

where the courts of common law provided an adequate remedy before; it seems to be plain that the judiciary act, at most, gave only a concurrent jurisdiction to the admiralty.

The great argument against the jurisdiction of this court, to decide a question of salvage, was founded upon the decisions respecting prize causes. As to this argument, the common law courts in England, never had any jurisdiction of questions of prize of war. This was most elaborately adjudged in the great case of *Le Caux v. Eden*, Dougl. 594; and it was there shown to have been the settled law for more than a century. Of course there could be no pretence that our state courts had a maritime jurisdiction, which the English common law courts had not; and it has never been claimed. In the case of *Hallett v. Novion*, 14 Johns. 273, (reversed in 16 *ibid*, 327,) the supreme court maintained the suit, as establishing merely a marine tort, against the opinions of Spencer and Yates, justices, that it was a case of prize; and the court of last resort, reversed the judgment, on the sole ground, that the captors claimed to have seized the vessel as prize of war, which involved a question not determinable in a court of common law.

The jurisdiction in cases of prize, rests upon the law of nations, and is peculiar, in England, as well as in the United States. In England the admiralty court, acting upon those questions, is called a *prize court*; when acting upon all others it is an *instance court*. It not only has different names, but the two courts differed essentially; because the appeal was to a different tribunal in the instance court, from that provided in the prize court. In the latter, the questions arising were political; in the former, they were the ordinary questions of municipal and commercial law.

Moreover, the prize court only exists in England by force of a commission issued on the breaking out of hostilities; and a new commission is requisite to provide for each new war. The judge of the instance court of admiralty, it is true, is uniformly clothed with the prize jurisdiction under such commissions; but there is no legal obstacle to its being conferred on another and distinct judge. (See *Lindo v. Rodney*, Dougl. 623.) This being the constitution of the prize court of admiralty in En-

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gland, it was stoutly denied, in the origin of our constitutional government, that the act of congress creating the district courts conferred any jurisdiction upon them in cases of prize. It was not till after conflicting decisions on the point, in two district and two circuit courts, that it was finally decided by the supreme court of the United States, that the district courts possessed the powers of a prize court of admiralty. (*Glass v. The Schooner Betsey*, 3. Dallas, 6 ; and see 3 *ibid.* 54.)

Thus it will be seen that on the only subject, which in England was beyond and exclusive of the jurisdiction of the ordinary courts of law and equity ; it was not until after serious doubts and contestation, that our courts of admiralty were held to possess jurisdiction, by a decision of the national court of last resort.

There was subsequently a struggle relative to the instance powers of the district courts of admiralty, touching seizures for forfeitures provided by acts of congress, in laws other than those regulating trade, imposts and navigation ; but the jurisdiction was fully maintained.

Next came the effort to bring all marine contracts within the admiralty powers of the district courts. To the extent which the English admiralty took cognizance of such contracts, there was no difficulty ; but the attempt to exercise in our courts of admiralty, the large powers which were claimed for that tribunal several centuries ago, and which were so zealously and successfully resisted by the common law judges in England, was inflexibly opposed in the supreme court of the United States. The same is true of the subsequent claim of jurisdiction in the district courts, in cases of marine torts occurring on our inland waters, and within the limits of counties.

Mr. Justice Story contended for the enlarged jurisdiction for enforcing marine contracts, in *De Lorio v. Boit*, (2 Gall. 398,) and *Peele v. The Merchants Insurance Co.*, (3 Mason, 27 ;) while the opposite view was maintained with equal zeal, by Mr. Justice Johnson, in *Ramsay v. Allegre*, (12 Wheat. 614.) In *Bains v. The Schooner James and Catherine*, (1 Baldw. C. C. 544,) Judge Baldwin delivered an able judgment against the existence of jurisdiction in the district courts, to enforce con-

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tracts regulated by the common law, though made concerning maritime subjects. The discussion was renewed in the *Merchants Bank v. The N. J. Steam Nav. Co.*, (6 Howard's Rep. 344,) no longer ago than last year; when Mr. Justice Daniel contended against the jurisdiction, in a powerful and elaborate opinion; and it may be considered an open question at this moment, whether our courts of admiralty have, as a concurrent jurisdiction, cognizance of any class of marine contracts, which were not, at the revolution, within the jurisdiction of the English admiralty.

In *Waring v. Clarke*, (5 Howard, 441,) a majority of the supreme court of the United States, decided that the district court in admiralty could entertain a libel as for a marine tort, for damages sustained by the collision of two steamboats on the Mississippi river. Judge Wyne delivered the prevailing opinion, which was met by a full and very able dissenting opinion from Judge Woodbury, in which two of his associates concurred. The great point of the argument in the majority opinion, was to show that the district court had concurrent jurisdiction of the tort, with the courts of common law.

In *The American Insurance Co. v. Carter*, (1 Peters', 511, 546,) to which we were cited by the defendant's counsel, Chief Justice Marshall says, the exercise of admiralty jurisdiction in the states, can only be in those courts which are established in pursuance of the third article of the constitution of the United States. This observation of the learned judge, has no application to the point before us, because he was not speaking of common law courts at all; and he was arguing to show, that the legislature of a territory might establish a salvage court, for the reason that such legislature combined the governmental powers of both the state and the general governments; it being contended that the power conferred on congress by the constitution, to establish admiralty courts in the states, did not extend to the territories of the United States.

We were also referred to *Brevoort v. The Ship Fair American*, (1 Peters' Admiralty Rep. 81,) and to a note, founded on that case, in Story's *Abbott on Shipping*, 557. The case itself was a libel for salvage, and among other objections to the juris-

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diction of the court, it was shown that the ship had been delivered to the owners, the salvors could no longer proceed *in rem*, and the lien was gone. Judge Peters upheld his jurisdiction, and decided that admiralty could proceed *in personam* for salvage ; also, that the lien was not gone. He said further, that no case is produced in a common law court of a suit for salvage on the high seas, and the reason for there being no such jurisdiction is, that the common law courts cannot proceed *in rem*. This, it will be observed, is not a decision ; and the reason assigned, while it is inapplicable to courts of equity, does not apply to cases in the courts of law, where salvage comes in question incidentally.

We have thus briefly reviewed the history of maritime jurisdiction, under our national constitution, to show that it is essentially without change from the English system. The admiralty court is held to have the same powers as an instance and a prize court, that the same tribunal possesses there ; exclusive, as a prize court, and concurrent in its other jurisdiction, in all cases where the common law courts gave a competent remedy, and the admiralty was not made exclusive by law. The great struggle in the United States courts has been, to extend admiralty jurisdiction to cases which in England were exclusively confined to the courts of law and equity ; not to exclude from the concurrent jurisdiction here, any cases that were concurrent there.

We can find no reason for excluding questions of salvage from this concurrent authority, if parties choose to call for its exercise, and the cases are, in other respects, within the scope of our established jurisdiction. The authority in the English courts of common law was conceded, and many cases are reported where it was applied, both at law and in equity.

In this country we find one case, that of *Blake v. Patten*, (15 Maine R. 173,) where an action was maintained by a sailor against the master of a vessel, for his share of a salvage received by the latter. (And see Abbott on Shipping, by Story & Perkins, [556] 662.) The principle of *Percival v. Hickey*, (18 Johns. 291,) is decisive, although that was a marine tort, and not a salvage. A military salvage, arising upon a re-capture, is

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a case of prize, (*The Schooner Adeline*, 9 Cranch, 244,) and does not affect the question.

Our conclusion on the case, as made by the complaint, was declared on a former occasion. (*Cashmere v. Crowell*, 1 Sandf. R. 715.) It exhibits a tort committed at sea on the plaintiff's goods, commencing with an alleged salvage. The defence is a claim for salvage of the goods; not denying that they are the property of the plaintiff, or of some stranger, but claiming a lien for salvage services. The supreme court, in *Frith v. Crowell*, admit the general jurisdiction of a court of equity, to interfere to ascertain the extent of a lien, in aid of a party who must pay it before he can obtain possession of his property; and we suppose it is unquestionable.

This is a court of equity, and the plaintiff seeks to redeem his goods. But it is said the lien is a salvage claim, and this court has not the machinery properly to dispose of such a claim. Why not? The court of chancery, to which all our forms of procedure are now assimilated, has ever used the same civil law forms, which distinguish admiralty proceedings; and in a vast number of cases, growing out of corporations, joint stock companies, whaling adventures, the administration of estates, and the like; have entertained suits far more complicated and involved, and requiring more parties, than any salvage case to be found in the books. The libel in admiralty is the bill in chancery. Both courts proceed *in rem*, and both make decrees affecting numerous parties who do not appear, and who have no actual notice of the proceedings.

Assuredly, we feel no disposition to invite into this court cases involving questions of salvage; but we cannot say with truth, that the court is inadequate to investigate them. In this suit, if the plaintiff's motion be entertained, the course will be to place the property in the hands of a receiver; and, being perishable, he will be directed to sell it at once. The proceeds will remain in court until the claims can be determined. If there are not sufficient parties, the defect will be supplied; and on a reference, either with further parties, or by a notice to all persons interested, such as is given in partition cases and admin-

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istration suits, the referee will proceed to investigate the claims of all persons entitled to share in the salvage.

The propriety of our entertaining jurisdiction is also questioned, and the declension of the district court to take cognizance is cited, as adjudging its impropriety. The decree of that court gives the reason of its course, which was, that the property was taken by the salvage claimants on the British coast, within soundings, all the parties concerned were British subjects, and both ships were British vessels. The British Consul, interposing for unknown owners, made the objection to the court's taking cognizance of the matter; and the court, holding that it could exercise a discretion, declined to proceed.

The facts which influenced the United States district court, do not confer any discretion upon us. The case before this court shows sufficiently to require its action, that the property which is now here, if actually *salved*, was wrongfully brought here; and that parties who are foreigners and irresponsible, are seeking to carry it away, without any security to the owner that it will be taken to Great Britain, or to any country where he will ever hear of it again. He is willing to pay such salvage as the claimants ought to have, and he desires to have his property protected till their claim can be ascertained.

If there were a suit pending in the admiralty court, we might and should decline jurisdiction; but we have no right to refuse it, when required to act in a case within our proper cognizance, which is not in litigation elsewhere. If we err in our view of the jurisdiction of the common law courts, to decide upon salvage questions, we ought nevertheless to interfere for the protection of the plaintiffs property, until the question can be properly settled; but we entertain no doubt on the principal point.

As to the objection that the plaintiff brought upon himself the necessity for the salvor's removal of the goods, by opposing the proceeding in the district court; we find no sufficient evidence that he was an actor at all in that court. The British Consul interposed to protect the property belonging to subjects of his government, as he had a right to do; but he could not, as Consul, receive restitution, or even obtain a decree to that



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effect. (*The Bello Corrunes*, 6 Wheat. 152; *The Antelope*, 10 *ibid.* 66.)

This is not an action in the nature of the former action of replevin. It is more in the nature of a bill for redemption of chattels retained for a lien.

There must be a receiver appointed with the usual authority.

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ROCKEFELLER and OTHERS v. THOMPSON and OTHERS.

Where a vessel departs from a port at which a debt has been contracted on her account, for repairs, etc., in pursuit of some trade or business, it is a departure within the meaning of the statute relative to proceedings for the collection of demands against ships and vessels.

Where a steamboat was regularly employed in transporting passengers on the Hudson river between New York and Albany: *held*, that in contemplation of law, she was engaged in making coasting voyages; that every trip of the boat was a departure within the meaning of the statute, and that a claim or debt for work, labor and materials furnished such boat in the port of New York, ceased to be a lien upon the boat at the expiration of twelve days from the time of her departure from that port.

And where repairs were made by the plaintiffs upon a vessel at various times during a period of several months, in pursuance of general orders to them to do whatever work they should from time to time be directed by the officers of the vessel to do: *held*, that the contract was not an entire and indivisible one, but that each job of work done constituted a separate debt, which might be enforced by the plaintiffs.

March 9; March 17, 1849.

**MOTION** by the plaintiffs to set aside report of referee. This was an action brought by the plaintiff upon a bond executed by the defendants as the owners of the steamboat *Alida*, on the 13th October 1847, the conditions of which was, that the defendants would pay the amount of all such claims and demands as had been exhibited, which should be established to have been subsisting liens upon the *Alida*, at the time the bond was executed. The bond was given to obtain a discharge of the vessel from an attachment issued against her at the instance of the plaintiffs, upon an account amounting to about \$270, for

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work, labor and materials furnished and done by the plaintiffs to the vessel during the summer and fall of 1847.

Upon the trial, it appeared that the plaintiffs were partners in trade, as painters; that in May or June, 1847, they were employed by the agent of the *Alida* to do work upon the boat, and were authorized by him to do from time to time whatever they should be directed to do by the pilot, engineer, or any one on board the boat. They did work upon the vessel at various times during the summer, until about the 20th of September. The work was mainly done on Sundays, that being the only day when the vessel was in port. The plaintiffs were in the habit of sending some one every Saturday to see what work was wanted, and they did what they could between that day and Monday. It was shown by the testimony of the witnesses, that the workmen were in the habit of doing as much as they could on each occasion, and then completing their work the next time the vessel ran into port, and that the work was not finished at any one time. There was some conflict as to whether the job was a continuous one or not.

It was shown on the part of the defence that the painting of the boat was done at different times; that whenever the painting became worn, they would have it re-painted.

A bill of particulars of the plaintiffs' charges were given in evidence.

It also appeared that the steamboat was owned from May 1847 to the 20th of September of that year, by W. R. McCullough, and was a passenger boat running in the day time, on alternate days, between New York and Albany. On the 21st of September, McCullough conveyed the boat to E. Stevenson, who, on the 27th of the same month, conveyed to the defendants. It was shown that the vessel left New York on the 17th September, 1847, for Albany, and that on the 29th day of December, 1847, a legal tender was made by the defendants to the plaintiffs' attorneys, of the sum of \$70, in full for any lien which the plaintiffs' had on the 2d of October, 1847, (the time of taking out the attachment,) for work, labor, and materials done or used in the *Alida*, and also the costs of the proceedings on the attachment, and of this suit up to the time of the tender.

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The amount of work, labor, and materials, as set forth in the bill of particulars, subsequent to the 17th of September, on which day the vessel left New York, was less than \$70.

It was contended on the part of the plaintiffs, that the job being a continuous one, there was no debt until the work was finished, and therefore there was no such departure of the steamboat within the meaning of the statute, as avoided the lien at the expiration of 12 days after the debt was contracted.

The defendants contended that the lien for each separate charge embraced in the bill of particulars, ceased within 12 days after the departure of the vessel, and they tendered all that accrued within the twelve days preceding the attachment.

The referee reported that the sailing between New York and Albany was each time a departure such as is contemplated by the statute, and that the lien for whatever was then due, would cease in 12 days; that although the work performed by the plaintiffs might have been a continuous or running account, yet that payment could have been required at any time for the work which had been done; and that, therefore, the work performed constituted a *debt* by itself; that the lien for the charges in the account of the plaintiffs, was lost within twelve days after the vessel sailed from New York, subsequent to the accruing of such charges respectively. The referee reported that there was due to the plaintiffs the sum of \$70, being the amount as tendered.

*Dill and Davidson*, for the plaintiffs.

*Smith and Woodward*, for the defendants.

**BY THE COURT.** VANDERPOEL, J.—The statute provides, (2 R. S., p. 493, § 1,) that whenever a debt amounting to \$50 or upwards shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state, on account of any work done, or materials or articles furnished, in this state, for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel, such debt shall be a lien upon such ship or vessel.

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The second section provides, that when the ship or vessel shall depart from the port at which she was when such debt was contracted, to some other port within the state, any such debt shall cease to be a lien at the expiration of twelve days after the day of such departure; and in such cases, such lien shall cease immediately after the vessel shall have left this state.

The attachment referred to in the bond in suit, was delivered to the sheriff on Saturday, the second of October, 1847, and was executed by the seizure of the steamboat *Alida*, on the fourth of October, at one o'clock in the morning.

For the plaintiffs, it is insisted that their claim was upon an implied contract running through the whole season; that there was no particular job done, but the work was going on through the whole season, and that the proceeding having been taken within twelve days after the last item, was good for the whole. The referee decided otherwise, and we approve of the conclusion to which he came. The vessel ran to Albany three times a week, and it seems to be conceded that she went to Albany on the 17th of September. If this was "*a departure from the port.*" within the meaning of the statute, then the lien for all charges previous to that date was gone before the attachment was taken out. The vessel was engaged, in contemplation of law, in making coasting voyages. In *The Steamboat Company v. Livingston*, (3 Cow. 747,) the court of errors held, that a voyage in a vessel of suitable tonnage between New York and Albany, is as much a coasting voyage as from Boston to Plymouth or New Bedford. Every trip of the boat to Albany was a departure within the meaning of the statute; and if the plaintiff had a claim or debt, such as is specified in the statute, it ceased to be a lien at the expiration of twelve days after the day of the departure of the vessel. In *Hancox and Others v. Dunning*, (6 Hill, 494,) the vessel made a short excursion beyond the bounds of the state, for the mere purpose of testing her machinery, and immediately returned, and it was held that this was not a leaving of the state within the meaning of the statute. But the court then held, that if a vessel departs from the port in which the repairs are made, *in the pursuit of some trade or business*, that it is a leaving of the port within the

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meaning of the statute. That was the case of this vessel. She left New York three times a week in pursuit of her regular business; and we hesitate not to say, that every time she left New York or Albany, she "*departed*" from each port within the meaning of the statute.

The referee repudiates the idea that the claim of the plaintiffs was upon an implied contract running through the whole season, and that it was not due until the transfer of the boat took place; and in this, too, we think he was right. We see nothing in this case that could have prevented the plaintiffs from enforcing payment of their claim for work and materials, every time the vessel departed for Albany, or, at least, every week. Miller, the clerk of the boat, testified that the boat wanted painting every week or two, and whatever was wanted to be done, they ordered the plaintiffs to do; that the painting of certain parts of the boat was done at different times; they would wear the part painted two or three months, and then paint it again. This gives a fair idea of the character of the work. It was palpably not the result of one entire and indivisible contract. The plaintiffs could have presented their bills and enforced their claims from time to time.

The motion to set aside the report of the referee is denied.

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MYERS, Appellant, v. MCCARTHY, Respondent.

**Where** a defendant, on the trial of a cause, called the plaintiff as a witness, under the 349th section of the Code, and in reply to a question put to him by the court, the plaintiff testified to new matter, going beyond the point to which he was examined by his adversary: *Held*, that the defendant was entitled to offer himself as a witness for the purpose of answering the new matter.

March 10, 1849.

**THIS** was an appeal from a judgment of the assistant justices' court. McCarthy sued Myers in the court below, for wages due for the work and labor of his son. The pleadings were a

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complaint, answer and reply. The plaintiff proved the amount of labor performed, and the value thereof, and rested his case. The defence was, that the demand in suit had been settled by the giving of Myers' note for the amount, at ninety days, and the acceptance thereof by McCarthy, the plaintiff. For this purpose, Henry D. Sharrat was examined as a witness, who testified that in June, 1848, he was a clerk for a lawyer of the name of Van Hovenburgh, whom McCarthy employed to collect the demand in question; that a letter was written to Myers on the subject of the claim, and he called at Van Hovenburgh's office; that he said he could not pay McCarthy's claim, but would give his note for the amount at ninety days; that the witness said he would consult McCarthy; that McCarthy soon after came into the office, and being told what Myers proposed, said he did not want a note; that the witness told him that the best thing he could do, would be to take the note; to which he replied, "Very well." That the witness then drew the note, and it was signed by Myers, and read by McCarthy; that Myers then left the office, and the witness gave the note to his principal, Van Hovenburgh; that the note was given as a settlement in full for the amount due from Myers to McCarthy, for the wages which are the subject of this suit; that the witness acted throughout as Van Hovenburgh's clerk, and that McCarthy was privy and a party to the whole transaction of taking the note; and that subsequently, he had heard McCarthy demand the note from Van Hovenburgh. McCarthy then called Daniel B. McCarthy, who testified generally as to McCarthy, the respondent's, demand of his papers from the witness Sharrat, &c. After which Myers called McCarthy himself as a witness, who, in reply to a question by Myers, said he had never applied to Van Hovenburgh for the note; and then further, in reply to some questions put to him by his own counsel and by the court, he testified that he had never given any authority to Van Hovenburgh to act as his attorney, as aforesaid. Myers then offered himself as a witness, to rebut the testimony of McCarthy not responsive to Myer's inquiries. This evidence was objected to by McCarthy, and was rejected by the justice.

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The court thereupon gave a judgment for McCarthy for \$42 38; and Myers appealed.

*C. N. Potter*, for the appellant.

*D. A. Kane*, for the respondent.

BY THE COURT. VANDERPOEL, J.—The 349th section of the Code of Procedure provides, that “A party examined by an adverse party may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testifies to any new matter, not responsive to the inquiries put to him by the adverse party, such adverse party may offer himself as a witness in his own behalf.”

In this case, the question whether Van Hovenburgh, or his clerk, was authorized to take the note of the defendant below, was a material one. The defendant, under the above section of the code, called the plaintiff below, and asked him whether he ever went back to Van Hovenburgh’s office to ask him for the note, after it had been taken by Sharrat. To this, he answered in the negative, and then, in reply to an interrogatory propounded to him by the court, he further stated, that he never consented to take the note in question. This answer, not called forth by the defendant, went to a vital point in this cause. In making it, the plaintiff below went beyond the point to which he was examined by his adversary, and it was therefore emphatically a case where such adversary might offer himself as a witness on his own behalf, in respect to the new matter. It was no answer to the defendants request to be sworn in respect to the new matter, that it was called forth by a question of the court. It was nevertheless evidence in the cause, and such as the defendant below should have had the privilege of answering by his own testimony, if he could. The justice was clearly wrong in rejecting the defendant; but as the plaintiff below had no agency in inducing the error, and it was the act of the justice alone, we do not think the plaintiff ought to be mulcted in costs. The judgment must therefore be reversed, without costs.

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**M'Guire v. Gallagher.**

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We forbear to express any opinion upon the point whether the plaintiff below did, in point of fact, authorize the note to be taken. We reverse the judgment exclusively on the ground that the justice erred in refusing to let the defendant testify in respect to matter which the justice himself improperly called forth.

Judgment reversed.

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**M'GUIRE v. GALLAGHER.**

A judgment is an express contract of record.

Assistant justices and justices of the peace, have jurisdiction of suits upon judgments. They are actions *arising on contract*.

A justice's judgment, recovered before the code of procedure took effect, is not within the provision of the code prohibiting suits upon such judgments within two years after their rendition.

*Semble*, an assistant justice's court, is a court of a justice of the peace, within the meaning of the section of the code which regulates actions on judgments.

March 10th ; March 31st, 1849.

THIS was an appeal from one of the assistant justice's courts, where M'Guire, in October, 1848, sued Gallagher, upon a judgment, for \$33 25, recovered by him before an assistant justice, on the 6th day of November, 1846.

Gallagher demurred to the complaint, for the following causes :

1st. That under the code, a justice of the peace has no jurisdiction of an action upon a judgment, rendered by a justice of the peace ; but that the suit upon such judgment, when properly maintainable, must be brought in a court of record. (§ 46 and 47.)

2nd. That an action cannot be maintained in any court, upon a judgment rendered by an assistant justice of the peace, without leave of the court, for good cause shown, on notice to the adverse party. That the exception given by § 64, to justice's



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judgments in this respect, does not extend to judgments of assistant justices in the city of New York.

3rd. That even in an action upon a justice's judgment, brought in a court of record, or in any court of competent jurisdiction, such action cannot be commenced within two years after its rendition, without alleging and proving one of the exceptions specified in section 64.

The court below overruled the demurrer, upon which the defendant answered, and the cause was tried and judgment rendered for the plaintiff, M'Guire. Gallagher appealed, on the grounds taken in his demurrer.

*Henry and Townsend*, for the appellant.

*J. B. Sheys*, for the respondent.

**BY THE COURT.** SANDFORD, J.—The appellant supposes that the assistant justices courts have no jurisdiction of an action of debt on a judgment, under the code of procedure.

The jurisdiction of these courts is prescribed in sections 46 and 47, to which section 59 refers, and among other matters, they have cognizance of *actions arising on contract* for the recovery of money only, if the sum do not exceed one hundred dollars. We regard a judgment as being a contract of the highest character. It is a contract in law, as distinguished from contracts in fact, but we have no doubt that it constitutes a contract within the meaning of this provision of the code.

It is scarcely necessary to cite authorities on the nature of a judgment in this respect. Blackstone says, the highest kind of express contracts, are those of record, as judgments, recognizances, &c. (2 Bl. Comm. 465, and see 6 Reports, 456; 1 Powell on Cont. 423.)

We do not understand section 64 of the code as evidencing a design to prohibit actions on judgments from being brought in justices' courts. It is express to the contrary, so far as to permit *suits* upon justices' judgments in the cases specified; which, in most instances, would of necessity be brought in justices' courts.

The appellant's two remaining points, we will consider to-

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gether. He insists that assistant justices' courts, are not courts of justices of the peace, within the meaning of the exception in section 64, and no leave of the court to sue the judgment in question was obtained; and 2d, that the suit was commenced within two years after the recovery of the judgment, without showing either of the causes for an earlier suit, which are permitted in that section.

As to the first point, were it necessary, we think we should hold that the court of an assistant justice is a court of a justice of the peace, within the meaning of this section of the code. There is another answer to both points, upon which we prefer to rest our decision.

When the code of procedure became an operative law, the plaintiff below had a valid and perfect right of action upon his judgment secured to him by existing laws. No statute is to be construed to affect vested rights, or to operate retrospectively, unless its terms imperatively require such a construction. The code guards against such an exposition of its provisions, by enacting in section 388, that "all rights of action given or secured by existing laws, may be prosecuted in the manner provided by this act." That is, the *right of action* is unaffected by the code, but the remedy is to be obtained, by the forms of action, pleadings and proceedings thereby established. The sixty-fourth section, if applied to this judgment, would suspend the plaintiff's right of action for two years, which is plainly contrary to the provision in section 388. We therefore think the plaintiff was entitled to maintain his suit, and there was no error in the judgment of the court below.

Judgment affirmed.

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Watson v. Bonney.

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## WATSON v. BONNEY and OTHERS.

A woman, in contemplation of marriage, by deed dated previous to the act for the more effectual protection of the property of married women, conveyed her estate, real and personal, to a trustee, in fee and absolutely, reserving to herself only the entire control of the income for her separate use for life, the direction of the investment and re-investment of the capital by the trustee, the power to dispose of the whole by an instrument in the nature of a will, and the full restoration of the property if she survived her intended husband. And the trust-deed provided, that in case of the decease of the grantor without making any appointment, the trustee should pay over and transfer the trust estate "*to such person or persons as would be her legal representatives by the statute, for the distribution of intestates estates.*" Held, that a complaint by the grantor, subsequent to the marriage, and during the life of her husband, brought for the purpose of having the marriage settlement set aside, and the capital of the estate given to her as she held and owned it previous to the date of the conveyance, could not be sustained, the infant children of the plaintiff having a contingent future estate in the property, which the court could not divest.

Held also, that if the property had been limited over to the "legal representatives" of the grantor, simply, the husband would, at his wife's death, have taken the property either beneficially, or officially, as her personal representative; but that the addition of the words "by the statute of distributions," changed the devolution totally, and carried it to the next of kin, to the exclusion of the husband.

Held, further, that the rights and interests of the parties, under the trust-deed, were not in any wise affected by the provisions of the act of 1848, "for the more effectual protection of the property of married women." And that the rule would be the same, even upon the assumption that the children of the plaintiff had no rights, under the settlement.

The object of that act was not to enable married women to destroy their marriage settlement, by which their property had already been effectually protected for the benefit of themselves and their children.

The statute does not profess to interfere with existing contracts, and the court cannot give it a retrospective action by intendment. If it had, in terms, been made applicable to executed settlements, and had divested the estates of the trustees, it would have been utterly nugatory and unconstitutional. Per SANDFORD, J.

March 22, 31, 1849.

THIS was an action commenced since the adoption of the code, to vacate and annul a trust-deed, executed by the plaintiff, in and by which she had, prior to her marriage, conveyed and transferred all her estate, real and personal, to the defendant, Bonney, as trustee. The facts, as they appeared in the

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complaint, are briefly these. On the 19th of May, 1846, an instrument in writing, in the nature of a trust-deed, was made and executed between the plaintiff, then a widow, of the first part, Benjamin W. Bonney of the second part, and Alexander T. Watson of the third part, by which the plaintiff, in contemplation of marriage with Watson, transferred all her real and personal estate to Bonney, as trustee, under certain trusts and provisions therein contained. By the deed, the plaintiff reserved to herself the entire control of the income for her separate use during life ; also, the direction of the investment and re-investment of the capital by the trustee, in case of a sale or exchange of any part of the estate, the power of disposing of the estate by an instrument in the nature of a will, and the full restoration of the property in case she survived her husband. Subject to these trusts, the conveyance was in fee and absolute. So long as the coverture continued, the settlement gave her no interest in the capital, and she possessed no power to dispose of the estates, by any conveyance, which could take effect during her life. It was also provided in the trust-deed, that in case of the decease of the plaintiff, without making a disposition of the property, then, that the trustee should pay over and transfer the legal estate to such persons *as would be the legal representatives of the plaintiff, by the statute for the distribution of intestates estates*. Alexander T. Watson assented to the provisions of the trust-deed, and covenanted not to interfere with the trust-estate, otherwise than in conformity to the provisions of the same. The instrument was executed and acknowledged in due form, and delivered and recorded in the office of the register of the city and county of New York. The marriage between the plaintiff and Watson took place May 20th, 1846. The trustee immediately took possession of the trust estate, and has ever since continued in possession, receiving and collecting the income of the same, and paying it over to the plaintiff. The plaintiff sought to vacate the trust-deed, on the ground that, by the act entitled, "an act for the more effectual protection of the property of married women," passed April 7, 1848, she may now take and hold the estate, without the intervention of a trustee, in her own name and right, and not subject

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to the disposal of her husband. The complaint prayed that the trustee under the deed, might account, pay over, and transfer to the plaintiff, all the trust estate which had come to his hands, and the income thereof not previously paid over, and that she might hold the same in her own name and right, as if she were a single female.

The trustee and the three infants, children of the plaintiff, were made parties defendant, as having, or claiming to have, some interest in the estate. Watson was not made a party. The defendant, Bonney, demurred to the complaint, on the grounds, that the plaintiff had no legal capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action.

The three infant defendants appeared, by Orsamus Bushnell, their guardian ad litem, and answered that they were infants under the age of 14 years, and submitting their interests in the matter in controversy, to the protection of the court.

*C. S. Roe*, for the plaintiff.

I. The complaint in this cause is properly filed by the plaintiff in her own name, without the intervention of a next friend. The action concerns her own separate property, and she may sue alone. (Code of Procedure, sec. 94. Laws of 1848, page 515.)

II. Under the act entitled "An Act for the more effectual protection of the rights of married women," passed April 7, 1848, the separate property of the plaintiff is effectually protected from any interference or control of her husband, and from liability for his debts. She may now safely hold, control, and manage the same in her own name, and it is her right so to hold and manage it. (Laws of 1848, page 307.)

III. The object, purpose, and effect of the deed, dated May 19, 1846, was to vest in the party of the second part, as trustee, the legal title to the property thereby conveyed, so as to secure to the party of the first part (the plaintiff) the sale and entire use and benefit of such property, and to give to her the absolute control and disposition thereof, and at the same time to protect it against the debts and acts of her husband. This is manifest

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from the terms of the deed ; the result of which is to give to the plaintiff the entire control of the estate. Consequently, since the passing of the act of April 7, 1848, she may and is entitled to take, hold, and manage it in her own name.

*B. W. Bonney*, in person.

I. The interest, object and effect of the trust deed was, (in contemplation of the marriage of the plaintiff,) to vest the title to her separate property from and after the solemnization of the intended marriage, in a third person upon certain trusts.

The effect of the deed was to give to the plaintiff the right to control and direct the investment of the trust property ; to take to her own use all the income during her life, and, upon the decease of her husband, leaving her surviving, to take to herself again the whole property. Also, in case of her death before the decease of her husband, to dispose of the whole property by will ; but if she shall fail to exercise such power of disposal, the property, upon her decease during the life time of her husband, is secured to her personal representatives, such personal representatives may be her children, (if then surviving,) or other persons. And they have an interest, contingent to be sure, and uncertain, but still an interest, which may be defeated by a present transfer to the plaintiff. If the property be now transferred to the plaintiff, it will be at her absolute disposal, and may be spent or lost, and then, in case of her death before the decease of her husband, and without having exercised the power of disposition given by the trust deed, nothing will remain to her legal representatives. In that event, they might hold the trustee responsible.

II. By the 4th section of the act of April 7, 1848, (Laws of 1848, p. 307,) it is enacted, that " All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place." The trust deed in question is such a contract, and is protected by that section. It is not permitted to the court to annul it.

III. The trustee has no personal interest in retaining the property, nor any wish to retain it, if he can safely part with it. But no present judgment of the court can protect him against contingent liability to third persons now unknown, who may

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become entitled to the property under the trust deed. Even the infants who are made parties defendant, would not be precluded by the judgment in this suit, should it be hereafter held that they, under the trust deed, had an interest, however remote or contingent, in the trust property which was not divested or cut-off according to the provisions of the deed.

IV. The trustee cannot safely part with the trust property; and no judgment of the court can protect him against the contingency of future liability. The complaint should therefore be dismissed. In any event, as the trustee has acted in good faith, and solely with a view to protect himself and the estate, the costs should be paid out of the trust estate, or by the plaintiff.

*W. Bliss*, for the infant defendants.

I. The infants have an interest in the question to be decided by the court. They have been made parties by the act of the plaintiff, and have a right to state any valid legal objections to any action of the court, which either will be, or in any event may be, prejudicial to their interests.

II. In case of the decease of the plaintiff after the marriage, and during the life time of the intended husband, and in default of her making any appointment, then the trust is, that the trustee, after the decease of the plaintiff, shall pay over and transfer the trust estate to such person or persons as would be the legal representatives of the plaintiff by the statute for the distribution of intestate's estates. In case of the decease of the husband during the life time of the plaintiff, the trust is to pay over and transfer the trust estate to her. These are alternative provisions. The persons who would be the legal representatives of the plaintiff by the statute for the distribution of intestate's estates, are the children. They are intended, (2 R. S., part 2, ch. VI., article 3, title. Ibid. p. 96, sec. 75, subd. 4. See also, 1 R. S. 751, sec. 1;) at least primarily. They presumptively are the next of kin, upon the decease of the plaintiff. The main object of the clause in question must have been to provide for the children of the marriage. In further illustration of this point we say, ●

(1.) That the words "legal representatives" may mean chil-

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dren. (See *Horspool v. Watson*, 3 Ves. 383 ; *Bridge v. Abbott*, 3 Brown Ch. R. 226, 227 ; and the use of the words in 2 R. S. 96, sec. 75.) In the statute of distribution, they mean children, or in default of them, other lineal descendants. At other times, the words mean descendants, (*Styth v. Monro*, 6 Simons, 49,) or next of kin. (*Bridge v. Abbott*, 3 Brown's Ch. R. 224 ; *Jenning v. Gallimore*, 3 Ves. 146 ; *Long v. Blackull*, 3 Ves. 486 ; *Robinson v. Smith*, 6 Simons, 47 ; *Walter v. Makin*, 6 Simons, 148.)

(2.) The husband is not intended. He is not next of kin ; (Ward on Legacies, 112 ;) nor entitled under the statute of distribution ; (2 R. S., part 2, ch. 6, art. 3.) The representation intended is not of office, but of right. The word is "representatives" in the plural number ; not representative. If the husband had been intended, a simple form of expression would also have been used. The words are not strong enough to divest the infants of their inheritance.

(3.) What may be the precise interest of the children, and how far vested or contingent, is submitted to the court. If contingent, they are still necessary parties, and entitled to be heard in vindication of their rights. (Calvert on Parties, 189, *et seq.*)

III. If the "persons who would be the legal representatives" of the plaintiff cannot be ascertained until her death, the court ought not, without any apparent necessity, to decide upon the rights of such parties in their absence. They would probably not be bound. Should the plaintiff survive her husband, this provision would never take effect or require decision. And the trustee for want of proper parties, might not be protected by the decree. (Calvert, *supra*.)

IV. The provision for the children is reasonable ; and there is no equitable ground upon which a court of equity should lend its aid to disturb it. (2 Kent's Com. 174 ; *Lowry v. Tiernan*, 2 Harr. & Gill. 34.)

V. The marriage settlement relates to both real and personal estate. So far as the trust estate consists of real estate, the interests of the trustee and of the wife are respectively inalienable. (1 R. S. 730, sec. 60, 63, 65 ; *Coster v. Lorillard*, 14 Wend. 265 ; see pages 303, 304, 331, 333 ; *Hawley v. James*, 16 Wend.



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118, 120, 121, 164, 165.) The trust estate of that species cannot therefore be destroyed by the concurrent act of all the parties to the deed uniting in a conveyance. (See American Law Mag. for July, 1844, p. 297.) Consent is immaterial. The plaintiff asks the court to decree that the trustee shall do precisely what he is prohibited from doing by statute. If the plaintiff could alien or release her own interest, and thus, so far as respects herself, destroy the trust, she could not affect the interest, vested or contingent, which is limited upon her decease in the life time of her husband. The power to alienate, conferred by the trust deed, is for investment only.

VI. The 4th section of the act of 7th April, 1848, (Session Laws of 1848, p. 307,) expressly enacts that "All contracts made between persons in contemplation of marriage, shall remain in full force after the marriage takes place." This, in the first place, has the effect of an exception of such contracts from the operation of the act. But, secondly, it is a substantive enactment that all valid contracts, past or future, of that sort, shall remain or continue in full force, from the time of the marriage, when that has once taken place. This accords with the general intent of the act, which was designed "for the more effectual protection of the property of married women." The plaintiff asks the court to decree that this contract, "made in contemplation of marriage," shall not remain in force, after the marriage has taken place. Past contracts in contemplation of marriage, are within the principle of protection intended by this section, by equal and even higher reason than future contracts. "Takes place" is present, and as applicable to the past as the future. The intent is to declare ante-nuptial contracts inviolate only where the contract is followed by marriage.

VII. The second section of the statute should be so construed as not to affect existing marriage settlements.

(1.) Because the constitution of the United States prohibits a state from passing "a law impairing the obligation of contracts." (Const., art. 1, sec. 10, sub. 1.)

(2.) Because the final clause of that section, to wit: "Except so far as the same may be liable for the debts of her husband

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heretofore contracted," shows that the section relates to property that may be thus liable.

(3.) Because the language of the section is, "The real and personal property, and the rents, issue and profits thereof, of any female now married." And under the revised statutes, a *cestui que trust* takes in lands "no estate or interest," but only "may enforce the performance of the trust in equity." (2 R. S. 729, sec. 60.) The language of the section is not appropriate to trust property.

(4.) The reason of the enactment does not exist in the case of property secured by marriage settlement, as the protection of the statute is unnecessary, when there is a marriage settlement. The case is not within the supposed mischief.

(5.) The section being in derogation of the common law, should be construed strictly. It should be held not to affect the property or rights of a trustee or third person.

The act does not retrospect to the marriage. If not confined to property acquired after the passage of the act, (*Dash v. Van Kleeck*, 7 Johns. 497,) the language should be restrained to such as is within the supposed mischief, and to such as without the protection of the act, would be at the disposal of the husband, and liable for his debts.

X. If not to be so construed, the section is unconstitutional. (Const. of U. S. *ubi supra*; *Dartmouth College v. Woodward*, 4 Wheat. 518, 695, 696, 7, 8; *Fletcher v. Peck*, 6 Cranch, 136.)

X. The section is also unconstitutional, because where there is no marriage settlement it affects the rights of property vested in the husband by the marriage.

(1.) Those rights are a part of the contract of marriage. The law of the matrimonial domicile, or law under which the marriage took place, which must be presumed to have been the law of this state, the present residence of the parties, or at least to have been the common law, being part of the contract. (Story on Conflict of Laws, last ed., ch. 6, secs. 158, 159.)

(2.) Those rights are vested rights. By the marriage, the husband acquires a freehold interest, during the joint lives of himself and wife, in all such freehold property of inheritance as she was seised of at the time, or may become seised of during

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coverture. Upon the birth of issue, capable of inheriting, he becomes tenant by the curtesy initiate, and on the death of his wife, tenant by the curtesy consummate. (1 Roper on Husband and Wife, 3, 5.) Marriage is an absolute gift to the husband of all personal property of the wife, in possession, belonging to her at or during marriage; (1 Roper on Husband and Wife, 169;) and a qualified gift, that is, subject to survivorship, of her chattels real, possessed by her during marriage; (Ibid. 173;) and of her choses in action, belonging to her at marriage, or acquired during coverture. (Ibid. 203, 224, 225.) He may alien the former, and assign, release, or collect the latter. "The legal assignment of a marriage," says Lord Meadowbank, "operates without regard to creditors the world over." (*Royal Bank of Scotland v. Smith*, 1 Rose Cas. Bank. Appendix, 491.) These vested rights cannot be taken away by statute. The legislature can take away private property for public uses only, and upon making suitable compensation. (State Const. of 1846, art. 1, sec. 1; Ibid. sec. 7; *Taylor v. Porter*, 4 Hill, 140, and cases cited; *Fletcher v. Peck*, 6 Cranch, 135; *Terrett v. Taylor*, 9 Cranch, 50.)

XI. As neither the settlement, nor the property embraced in it, are affected by the act of April 7, 1848, except to preserve and perpetuate, the whole ground and object of the complaint must fail.

XII. The infant defendants are entitled to their costs, and a reasonable counsel fee, out of the estate.

BY THE COURT. SANDFORD, J.—In May, 1846, the plaintiff, then a widow, conveyed and transferred all the property in question to a trustee, in fee, and absolutely. The only rights she reserved were, the entire control of the income for her separate use during her life, the direction of the investment and reinvestments of the capital by the trustee, the power to dispose of the whole by an instrument in the nature of a will, and the full restoration of the property, if she survived her intended husband. So long as the coverture continued, the settlement gave her no interest in the capital, and she had no power of disposal which could take effect during her life.

The intended husband joined in the conveyance, and covenanted not to interfere with the trust estate otherwise than in conformity to the provisions of the settlement. He is not at liberty, therefore, by assent or acquiescence, to defeat or impair the designs of the trust.

In the event of the plaintiff's death, leaving her husband surviving, and without having made any appointment, the trustee is required to pay over and transfer the trust estate "*to such person or persons as would be the legal representatives*" of the plaintiff, "*by the statute for the distribution of intestate's estates.*"

The first question argued arises upon this clause of the settlement. It is claimed, on the one hand, that if the plaintiff die, leaving her husband and children surviving, the husband will take the trust estate; and on the other hand, that it will all devolve upon the children.

Conceding for the argument, that if there be both husband and children living at the death of the plaintiff, the former would be entitled to the capital of the trust estate, in default of an appointment: the nature of the respective interests in the property, at this time, are as follows:

The whole *estate* is in the trustee. The plaintiff has a trust interest in possession, in the income of the property, for life, with a future absolute interest in trust, which is contingent upon her surviving her husband; and a power to dispose of the whole by will. The husband has a future trust interest in the capital, contingent upon his surviving the plaintiff, and which, if it ever vest in him, in possession, will also be an absolute estate. The children have no interest in the property. They have merely probable advantage in the continuance of the trust, so that they may become appointees under the power. This is putting the case in its strongest possible aspect for the plaintiff, and what is the result?

*First.*—As to the real estate, neither the plaintiff nor her husband have any estate or interest in the property itself. They have only a right in equity to have the trust executed. (1 R. S. 729, § 60.) The plaintiff's right to receive the income is inalienable. (Ibid. 730, § 63.)

*Next.*—As to the personal property, the settlement restricts the disposal of the income, and prohibits the consumption of the capital. It is a contract, which the plaintiff, at least before the act of 1848, had no capacity to alter, and the husband is prevented by his covenant from interfering in the matter. However, in respect of the whole fund, both real and personal, the trustee is forbidden by law, to do any act in contravention of the trust. And the husband's trust interest in the personalty, being both future and contingent, it is subjected to all the fetters upon alienation provided in the statute of uses and trusts. (1 R. S. 730, § 65 ; 773, § 2.)

Such being the state of the rights and interests of these parties, at the passage of the act of 1848, entitled "An act for the more effectual protection of the property of married women." (Laws of 1848, ch. 200, page 307,) are they in any wise affected by its provisions?

The second section, on which the plaintiff relies, enacts that "the real and personal property, and the rents, issues and profits thereof of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." The object of the statute, as expressed by its title, assuredly, was not to enable married women to destroy their marriage settlements, by which their property had already been "effectually protected," for the benefit of themselves and their children. All experience demonstrates, that vesting the wife with unlimited control of her property, will place it in far greater jeopardy than limiting it by a judicious settlement.

To apply the act to this estate. What was the real and personal property and its income, belonging to the plaintiff, which by the act were to be her sole and separate property, as if she were a single female? Not the property which she owned before her marriage, and as it existed when the settlement was executed. She had parted with that, irrevocably, to the trustee. All the property she had, at the passage of the act, was her interest, present and future, in the trusts created by her conveyance to the trustee, to be exercised over and upon the

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property transferred to him. Such right and interest as she had, was her *sole and separate property* at the passage of the act, as effectually as it was possible to be in the nature of things. If she were a single female, she could not alter her executed conveyance to the trustee. The statute, therefore, did not affect it, for the plain reason, that she had already all the control that the statute aimed to give.

The effort and the argument, on the part of the plaintiff, is not to have a more enlarged control of her property, as she held it under the marriage settlement; but to set aside the settlement and give to her the capital of the estate, as she held and owned it before her conveyance to the trustee.

The statute does not profess to interfere with existing grants and contracts, and if there were no other obstacle, we cannot give it a retrospective action by intendment. If, however, it had, in terms, been made applicable to executed settlements, and had divested the estates of the trustees, it would have been utterly nugatory. (a) The plaintiff's grant to the trustee is a contract, and even the possibilities created by it, are perfect rights of property, held under an executed contract. A statute impairing this grant would be void, by the provision in the constitution of the United States, against enactments by the states impairing the obligation of contracts.

The result is, that assuming the children have no rights in the settlement, the statute of 1848 does not affect it, and the parties in interest are precluded by the statute of trusts, from revoking the conveyance to the trustee.

If, perchance, we have taken too restricted a view of the effect of the settlement, and the capacity of the parties to reconsider and annul it, since the act of 1848, there can be no doubt that the trust is irrevocable by this court, as well as by the parties, provided the children are to take in default of an appointment, on the death of the plaintiff in her husband's lifetime. In the event of such default the property is to devolve

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(a) *Holmes v. Holmes*, (4 Barb. Sup. Court Rep. 295;) *White v. White*, (5 Id. 474.)

upon those who are the plaintiff's legal representatives, by the statute of distributions.

The term "legal representatives" is not used in this instrument in its ordinary sense. It clearly does not mean executors or administrators. It is those legal representatives who are designated by the statute of distributions of intestate's estates. Now the husband, at no period of the law, has taken the wife's personal property at her death, "*by the statute of distributions.*" He is entitled to it by the rules of the common law and would take it if the whole statute law were silent on the subject. The only reason for mentioning the husband's right in the statutes relative to administration and distribution, is in the one case to regulate the claim to administer, and in the other, from abundant caution, to exclude any possible mis-application of the section governing the distribution of intestate's personal effects. (See 2 R. S. 75, § 29, 30; Ibid. 96, 97, § 75, 79; 1 Rev. Laws, 313, 314.)

The husband would, at her death, be the plaintiff's legal representative, (in the sense in which the words are used in this instrument,) by the rules of the common law; her children and their issue, would be her legal representatives by the statute of distributions. If the language had been simply, her "*legal representatives,*" the question would have been between the husband and the administrator; and as our statute grants administration to the husband, he would have taken the property either beneficially, or officially, as such representative. But we think the addition of the words "*by the statute of distributions,*" changes the devolution totally, and carries it to the next of kin, to the exclusion of the husband.

We find no parallel case in the reports, though there are several, either analogous in principle, or in favor of excluding the executors and administrators; among which are *Walter v. Makin*, (6 Simons, 148; ) *Cotton v. Cotton*, (2 Beavan, 67; ) *Booth v. Vicars*, (1 Collyer's Ch. C. 6; ) and the cases collected in 2 Jarman on Wills, 39, &c.

In this construction of the trust deed, the infant children of the plaintiff have a contingent future estate, which the court cannot divest, and which the statute of 1848 would have failed

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to affect, if it had attempted it in terms. And further, all the future issue of the marriage will have similar estates, which any decree in this suit could not affect or impair.

The complaint cannot be sustained, and there must be judgment for the defendants.

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**HERRING v. WILLARD.**

A sale and delivery of property on condition that the title shall not pass to the purchaser until the purchase money is paid, and reserving to the vendor the right to take possession of the property, in case of non-payment, is a valid contract; and until the purchase money is paid, the vendor's title will not be divested.

Such an arrangement is, in effect, a letting of the property to the purchaser, to be reclaimed if the price fixed upon is not paid; and is not like the case of property placed in the hands of one who keeps similar articles for sale.

The general principle is, that the title of the real owner must prevail in such cases.

March 29; April 7, 1849.

THIS was an action brought by the plaintiff, to recover from the defendant the possession of an iron safe, alleged to be the property of the plaintiff, or the value of the same, which was claimed to be the sum of one hundred and sixty dollars.

The pleadings consisted of a complaint and an answer. It was alleged in the complaint, that the safe, for the recovery of which the action was brought, was delivered by the plaintiff to the firm of Young & Co., in the city of New York, under an agreement in writing, which provided that the title should still remain in the plaintiff, and that the sale should be considered a conditional one. At the time of the execution of the agreement, Young & Co. gave their promissory note for the value of the safe, payable in six months. It was provided in the agreement, that in default of the payment of the note, the plaintiff should be at liberty to enter the premises of Young & Co., and take possession of the safe. The complaint alleged that the defend-



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ant had taken possession of the safe, and that the plaintiff had demanded the same, which was refused.

The defendant in his answer, denied all knowledge as to the main facts alleged in the complaint, but set up, that if any such agreement was made, it was never filed, so as to make it valid as a mortgage. The answer also alleged, that subsequent to the delivery of the safe by the plaintiff to Young & Co., the defendant rented certain premises to them, and that, to secure the payment of the rent, he took a mortgage of the safe from Young & Co.; that the mortgage was duly filed, and default being made in the payment of rent, he had taken possession of the safe.

No reply was put in, and consequently the new matter alleged in the answer, was admitted. The cause came on for trial before Chief Justice OAKLEY, on the 8th day of January, 1849. Upon the trial, the plaintiff read in evidence a receipt given by the firm of Young & Co., at the time of the delivery of the safe to them, and the giving of the promissory note, which receipt was in these words :

"Received, New York, February 12th, 1848, of S. C. Herring, one Wilder's Patent Salamander Safe, No. 2355, delivered to us under a bargain for the sale thereof, and for which we have given said Herring our note, payable in six months from this date, for one hundred and sixty dollars. It is expressly understood, that said Herring neither parts with, nor do we acquire any title to said safe until said note is fully paid. And in case of default of payment thereof at maturity, said Herring is hereby authorized to enter our premises, and take and remove said safe, and we agree to pay said Herring for use of said safe, and all reasonable charges.

(Signed,)

"YOUNG & Co."

It also appeared in evidence, that the promissory note mentioned in the agreement, was due and unpaid.

The plaintiff thereupon rested his case, and the defendant moved for a nonsuit. The motion was denied, and a verdict rendered by consent for the plaintiff, for \$164 47, reserving the questions of law for the court.

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*S. P. Nash*, for the plaintiff.

*R. M. Tyssen*, for the defendant.

BY THE COURT. OAKLEY, CH. J.—The question in this case is, who has the better title to the salamander safe, Herring or Willard?

It is contended on the part of the latter, that by Herring's parting with the possession of the property, and leaving it with Young & Co., as the apparent owners, Willard, on receiving a mortgage of the safe from Young & Co. for rent payable to him, became a *bona fide* purchaser of the same, and is entitled to retain it.

We have considered the matter, and think Herring has the better title. It is plain that he never parted with the title; and there is a fatal defect in the outset of Willard's claim as a *bona fide* purchaser, in this, that it is not alleged in his answer, and it no where appears, that when he took his mortgage, he was ignorant of the arrangement between Herring and Young & Co., by which the safe was put into their possession; or that he received the mortgage without notice of Herring's rights.

Independent of this point, we have no doubt, under the circumstances, that Herring is entitled to the property. There was not only a conditional sale of it to Young & Co., but a conditional delivery also. In effect, the arrangement was only a letting of the safe to Young & Co., to be reclaimed if they did not pay the price fixed upon; and in that event, they were to pay rent for its use.

It is exactly the case of leasing personal property, such as the furniture of a house, for permanent use; with the addition of an agreement to sell it at a future time, on receiving a stipulated price.

It is not like the case of property placed in the hands of one who keeps similar articles for sale; as goods deposited with a merchant or trader. The general principle is, that the title of the real owner must prevail; and there are no circumstances here to warrant an exception to the rule on any recognized ground. The case of *Strong v. Taylor*, (2 Hill, 326,) and se-

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veral in the Massachusetts reports, are authorities in favor of the plaintiff. Among the latter, are *Barnett v. Pritchard*, (2 Pick. 512;) *Fairbanks v. Phelps*, (22 Ibid. 535;) and *The Dresser Manufacturing Company v. Waterston*, (3 Metc. 9.)

Judgment for the plaintiff.

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HAWKINS and LOGAN v. APPLEBY and MOORE.

Where the plaintiffs, upon a sale of goods to the defendants, were induced to take the note of a third party in payment, upon the representation of one of the defendants that it was good, when, in fact, the defendants knew the makers were insolvent, and the note worthless. . *Held*, that the defendants were liable to the plaintiffs, either in an action of assumpsit to recover the value of the goods sold, or in an action on the case to recover damages for the deceit practised upon them.

A member of a co-partnership firm is liable either in assumpsit or in an action on the case, for the consequences of frauds practised by his co-partner, in the transaction of the partnership business, although he was entirely ignorant of such frauds, and derived no benefit therefrom.

Where goods are obtained for the use of a firm, by means of the fraud of one of its members, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act of the one who obtained them, and will be placed in the same situation, in reference to the rights of the vendors of the goods, as if he had directed his partner to procure the property, or had concurred with him in the transaction.

And where a partner, on being notified of a fraud committed by his co-partner, and that the firm will be held liable therefor, omits to repudiate or disaffirm what has been done by his co-partner, he will be held to have adopted and ratified the fraud, and will, from thenceforth, be deemed a joint wrong-doer. . . .

Where, in an action on the case for deceit, in falsely representing the note of a third person, turned out by the defendants in payment for goods purchased, to be good, it appears that the plaintiffs, on discovering the insolvency of the makers, disavowed the ownership of the note, and notified the defendants that they were held liable for the price of the goods, who insisted on retaining the goods, and omitted to pay the price and receive back the note, it seems this will be deemed a waiver of any formal tender of the note before suit brought.

Under such circumstances, it is sufficient for the plaintiffs to tender the note upon the argument.

Where it was averred in a declaration, that the defendants represented a note to be "a good note, and that it would pass in South-street," and the proof was that

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they said "the note was good, and that there were people in South-street who would take it." *Held*, there was no substantial variance.

March 8th; April 7, 1848.

THIS was an action of trespass on the case. The declaration set forth that, in the month of March, 1847, the defendants applied to the plaintiffs to purchase from them a quantity of tobacco, and offered in payment a promissory note of Barstow Emanuel, & Co., dated New York, January 15, 1847, for the sum of \$274 80, payable in six months; that the defendants represented the note to be good, and the makers in good credit, and that the plaintiffs relying upon the representations so made, sold and delivered to the defendants a quantity of tobacco, and took the note in payment. In the second count of their declaration, the plaintiffs averred that the defendants represented the note to be a good note, and that "*it would pass in South-street.*" The declaration further alleged that, Barstow Emanuel & Co., at the time of the transfer of the note to the plaintiffs, were wholly insolvent, and that the defendants, knowing such to be the fact, fraudulently made the purchase as set forth. The defendants pleaded the general issue.

The cause came on for trial on the 18th day of April, 1848, before Chief Justice Oakley, without a jury. Upon the trial, it appeared in evidence on the part of the plaintiffs, that about the 17th of March, 1847, Appleby, one of the defendants, applied to the plaintiffs to purchase a quantity of tobacco from them, offering in payment a note of Barstow Emanuel & Co., for \$274, dated January 15, 1847, at 6 months. Appleby said the note was good, and there were people in South-street who would take it. The plaintiffs had never dealt with Barstow Emanuel & Co., but upon the representations of Appleby, took the note, and delivered the tobacco. The bookkeeper of Barstow Emanuel & Co. testified that Appleby called at their store about the 13th or 15th of March, 1847, in reference to the delivery of a quantity of cigars which had been ordered by Mr. Emanuel, and which were to be sold on credit; that he, the bookkeeper, declined receiving them, assigning as a reason that Mr. Emanuel had gone to New Orleans, and was embarrassed

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in his business ; that, on the 13th of March, his notes had been protested ; that he distinctly informed Appleby that Mr. Emanuel was in difficulty, and much embarrassed.

Barstow Emanuel, one of the makers of the note, testified, that at the time of the transfer of the note in question, the firm was insolvent ; that they stopped payment on the 13th of March, 1847, and that on an investigation of their affairs, they found they could only pay 33 per cent. The plaintiffs then offered in evidence a letter written by them on the 30th of March to the defendants, and produced by the defendants in conformity with a notice, in which letter the plaintiffs stated that they had that day, for the first time, ascertained the insolvency of Barstow Emanuel & Co., and that they should hold the defendants liable for the tobacco sold. The plaintiffs also read in evidence two records of judgments against Barstow Emanuel & Co., upon which executions had been issued, one September 9, and the other October 9, 1847, both of which were returned unsatisfied ; also a protest and certificate of a notary public, by which it appeared that the before mentioned note was protested for non-payment, July 19th, 1847.

The plaintiffs then rested, and the defendant's counsel moved for a nonsuit, on the ground that the plaintiffs should have shown a tender of the note to defendants before suit brought.

The court refused the motion, and reserved the question.

The defendant's counsel then moved that the defendant Moore be discharged, in order to his admission as a witness. But the court refused, to which decision the defendant's counsel excepted.

A witness for the defendants testified, that about the 1st of March, 1847, he heard Hawkins, one of the plaintiffs, say, that he had offered to give tobacco to the defendants for Emanuel & Co.'s note, and that after the trade was made, Hawkins informed the witness he had made inquiries, and thought the note was good.

The testimony was then closed, and by consent, a verdict was taken in favor of the plaintiffs for \$289 94, subject to the opinion of the court, on a case to be made, and subject to such

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modification or adjustment of the verdict as the court might deem proper,<sup>1</sup> with leave to the defendants to move for a nonsuit.

*A. P. Man*, for the plaintiffs.

I. The plaintiffs have fully proved their case as set forth in the first and second counts ; and it is a clear case of deceit, viz. : a false affirmation with intent to defraud, and resulting in damage to the plaintiffs. (*Pasley v. Freeman*, 3 T. R. 51 ; S. C. in 2 Smith's Leading Cases, 55, with notes ; *Allen v. Addington*, 7 Wend. 1 ; and S. C. in error, 11 Wend. 374 ; 1 Chit. Pl. 157 ; *Read v. Autchinson*, 3 Camp. 352 ; 2 Kent's Comm. 482, 484 ; Story on Part. § 108 ; *Longman v. Pole*, 1 M. & M. 223.)

II. The concealment by defendants of the fact that Emanuel had failed, (of which fact they had peculiar means of knowledge,) and suffering the plaintiffs to act in ignorance of it, would alone have sustained this action. (Same authorities ; also, *Weeks v. Burton*, 7 Verm. Rep. 67. Story on Promissory Notes, § 118, and note ; Story on Bills, §§ 111, note, and 225.)

III. The plaintiffs are also entitled to recover in this form of action upon the footing of an express warranty. (See 2 East, 451 ; Peake's Ev. 229, [279 ;] 1 Chit. Pl. 157 ; 3 T. R. 51 ; 2 Caines' R. 56 ; 10 Wend. 413 ; 13 Wend. 277 ; 2 Cowen, 438.)

IV. In this form of action, it was not necessary to prove an offer to return the note. (Sedgwick on Dam. 296 ; also, pages 290, 296, 531, 538 to 540 ; 2 Kent's Com. 480, and note *a* ; 4 Bibb, 91 ; 1 Smith's Leading Cases, Am. Ed. of 1844, p. 157 ; also, see pages 153, 155 ; Stephen's N. P. 1296, 1297, 1301 ; *Nellis v. Bradley*, 1 Sandf. 560.)

V. The measure of damages is the difference in value between this worthless note, and a good one. In the present case, the damages are the full value of the property obtained by the deceit, that being *prima facie* (as well as by the proof in the case) the amount of the plaintiff's loss. The defendants, who are chargeable with deceit, have no right to complain of this rule of damages. (See authorities under preceding point ; also, 7 Wend. 10, 15, 26 ; *Monell v. Colton*, 13 Johns. 403.)

The note will belong to the defendants after payment of the

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plaintiff's damages. And to enable the court to see that no injustice is done to the defendants, we bring the note here, and offer to surrender it, or to hold it subject to the order of the court.

*E. W. Stoughton*, for the defendants.

I. There is a fatal variance between the case stated in the declaration, and that found.

(1.) The second count alleges, that the defendants represented the note to be "A good note, and that it would pass in South street." The proof is, that Appleby said, "The note was good, and that there were people in South street would take it." This is a material variance, and between the proof and first count, it is still greater. (See 1 Chitty on Pl. 310, *et seq.*; 2 Saund. Pl. & Ev. 913, *et seq.*)

(2.) The declaration alleges, that the defendants made the representation. The proof is, that it was made by Appleby. There is not the slightest evidence to show that Moore knew of or sanctioned the misrepresentation, or that he was aware of the failure or insolvency of Barstow Emanuel & Co. This also is a fatal variance, for which the plaintiffs must be nonsuited. (See *Weall v. King*, 12 East, 452; *Sherwood v. Marwick*, 5 Greenleaf, 295.)

II. The language used by Appleby, as alleged by the witness, was not a misrepresentation. He was not questioned by the plaintiffs as to the solvency of Barstow Emanuel & Co., nor did he make any representation concerning such solvency. Courts never presume a warranty or fraud upon the sale of a personal chattel or chose in action. Either, if alleged, must be clearly proved. The statement made, that the note was a good note, did not, by fair interpretation, import that the makers were solvent. Could the defendant, on proof of this representation, and that the makers were insolvent, be indicted for obtaining the tobacco by false pretences? The defendant Appleby, further stated there were persons in South street would take the note. What legal meaning can be attached to this representation? It may have been strictly true, but whether there are persons in South street who take notes of insolvents, or whether

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good paper alone will pass there, the court cannot judicially know. Nor did Appleby know the makers were insolvent when he parted with the note. This appears from the testimony of the witnesses, Jessup and Emanuel.

III. There is no proof that Moore knew of, or sanctioned, the representation alleged to have been made by Appleby; nor was he really interested in the note: this was known to Hawkins. A fraudulent representation by one partner, will not bind or affect the other, in this action. (*Pierce v. Jackson*, 6 Miss. R. 242; *Sherwood v. Marwick*, 5 Greenleaf R. 295.)

If the suit was directly upon the contract of warranty made by one of the partners, the rule would be otherwise. So also, the plaintiffs could have brought trover or replevin for the tobacco, at least after demand made therefor; as, in such case, retaining possession would be deemed the fraud of both defendants.

IV. The plaintiffs were not induced to take the note, or dispose of the tobacco, by the alleged representation of Appleby.

(1.) If it be contended, that this suit is brought upon a warranty, the answer is, that the representation was not intended or understood by either party as a warranty. It is essential that the affirmation made at the time of sale be intended as such; and this must appear by the evidence. If not, the affirmation is considered mere matter of judgment and opinion. (*Swett v. Colgate*, 20 Johns. 196; 2 Caines' R. 56; 3 Term Rep. 57.)

(2.) The plaintiffs were not defrauded by the representation. It must appear, in order to sustain the action, that the representation was made with intent to induce the plaintiffs to part with the tobacco, and that they, relying upon such representation, were so induced, and were thus defrauded. (Story Eq. Jur. 204, 5; 2 Kent's Com. 485, *et seq.*)

It appears, that several days before this representation was made, Hawkins had offered to take the note, and give the defendant, Appleby, tobacco for it. He was then satisfied as to the solvency of Barstow Emanuel & Co., and willing to part with the tobacco without the aid of this representation. Appleby knowing this, could not have intended, by making it, to obtain



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the tobacco, and the plaintiffs being before anxious to make the trade, could not have made it on the faith of the representation. Indeed, it is clear from the whole case, that the bargain was completed before the representation was used ; and that, if made at all, it was uttered without intent by Appleby, and was heard unheeded by the plaintiffs.

V. The plaintiffs elected to rescind the contract of sale, and should have tendered the note to the defendants before suit brought. Not having done this, they must be nonsuited. (*Baker v. Robbins*, 2 Denio, 136 ; *Massow v. Bovet*, 1 Ibid. 69 ; Chitty on Contracts, 741 ; *Pierce v. Drake*, 15 Johns. 475 ; *Thornton v. Wynn*, 12 Wheat. 189.)

(1.) It is conceded, that where there is a warranty upon the sale of a chattel, a suit may be brought upon it, either in case or assumpsit, without a return of the property ; and that damages may be recovered for the breach of the contract ; but in every such case, the warranty is set forth in the declaration as the ground of the action, and the contract of sale thus affirmed. Usually, assumpsit is brought, and when case or deceit is adopted, the contract and warranty must be set out in the declaration, with the same damages as in assumpsit. (2 Chit. Pl., 6th ed., 279, 480 ; 3 Chitty's Cr. Law, 306 ; *Mills v. Dell*, 3 Stark. Rep. 23 ; *Rex v. Gill*, 2 B. & Ald. 204 ; *Towers v. Barrett*, 1 Term Rep. 133 ; *Fielder v. Starkie*, 1 Hen. Bl. 17 ; *Buchanan v. ———*, 2 Term Rep. 745 ; 1 Comyns' Dig., action on the case for deceit, 350, *et seq.*)

(2.) If then there had been a warranty in this case, it cannot avail the plaintiffs ; for where a party intends to rely upon a warranty, he must expressly state it in his declaration. (*Sydney v. Sebby*, 2 Ld. Raymond.)

(3.) Not only do the two first counts charge fraud, and not contract, as the sole ground of action, thereby disaffirming the contract of sale, but the third and last count is in trover for converting the tobacco, alleging it to be the property of the plaintiffs ; thereby expressly disaffirming the sale, and electing to rescind the contract.

(4.) Independent of the form of action adopted by the plain-

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tiffs, they have elected to disaffirm and rescind the contract of sale.

(1.) By sending the note to the defendants, stating that they should hold them liable for the tobacco. And,

(2.) By their refusal to compromise with Barstow Emanuel & Co., on the ground, as they declared, that Appleby owned the note. Having thus elected to rescind, they are bound by the election. (*Smith v. Field*, 5 Term Rep. 402; *Green v. Russell*, 5 Hill, 183.)

BY THE COURT. SANDFORD, J.—The evidence suffices to establish, that the plaintiffs were induced to take Emanuel's note in exchange for their tobacco, by Appleby's representation that the note was good; when in fact it was not good, and Appleby knew it.

The declaration states this representation substantially as it was proved. Saying that there were people in South street who would take the note, is not essentially variant from saying that it would pass in South street.

The other alleged variance depends upon the principal question in the cause, the liability of Moore in respect of the fraud of his partner Appleby.

It has long been established, that a partner is liable in assumpsit for the consequences of frauds practised by his copartner, in the transaction of their business, of which he was entirely ignorant, and although he derived no benefit from the fraud. (*Collyer on Part.* 240; *Story on Part.* § 108.) This is upon the ground, that by forming the connexion, partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do within the scope of their partnership business; and if by the wrongful act of one, a loss must fall upon a stranger, or upon the other partner who is equally innocent, the latter having been the cause or occasion of the confidence reposed in his delinquent associate, must suffer the loss.

Several striking applications of this principle, are to be found among the adjudged cases; of which we will refer to *Rapp v. Latham*, 1 Barn. & Ald. 795; *Stone v. Marsh*, 6 B. & Cr. 551;

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*Hume v. Bolland*, Ryan & M. 371; and *Boardman v. Gore*, 15 Mass. 331.)

It is perfectly clear, that if the plaintiffs had wholly disaffirmed the sale, and sued Appleby and Moore in assumpsit for the price of the tobacco, they would have been entitled to recover. Is the rule different in an action to recover damages for the deceit practiced upon them? The difference in theory is, that in assumpsit the innocent partner is charged with the purchase of goods; while in the action of tort, he is accused of a fraud of which he personally is innocent. In practical effect, the only difference is, that in the one case the plaintiff alleges a sale and proves a fraud; in the other, he both alleges and proves the fraudulent transaction. In both forms of action, the innocent partner is subjected to liability, on the principle that he has held out his associate to be worthy of confidence, in their copartnership dealings. The difference in the ulterior remedy, after judgment, cannot have any effect upon the propriety of the form of action.

It is laid down in a respectable treatise on the subject of parties to actions at law, that where one takes property for the use of another, the latter may adopt the act; and he is thereby placed in the situation of one who had previously commanded the taking, and becomes a trespasser if the act were unlawful. (Hammond on Part. 84.) Now in this case, Appleby obtained the tobacco for the use of himself and Moore. Moore adopted the act by receiving and participating in the use of the property. He was thus placed in the same situation, in reference to the rights of the plaintiffs, as if he had directed Appleby to procure the property, or had concurred with him in the transaction; and on the authority cited, he become a wrong doer. There is the additional circumstance in this case, that the plaintiffs immediately on discovering the fraud, and within a fortnight after the exchange, notified the defendants in writing, that they had ascertained the note to be bad, and that they should hold the defendants liable for the tobacco.

The omission of Moore to repudiate or disaffirm, on this occasion, what his partner had done, must be regarded as a distinct adoption and ratification of the act; and we think he

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ought to be deemed from thenceforth a joint wrong doer with Appleby.

Another objection to the recovery, is the omission of the plaintiffs to tender the note to the defendants, before suit brought. The testimony elicited by the defendants showed that the plaintiffs disclaimed owning the note, and referred the maker to the defendants as the parties to collect or compromise it. And the defendants, when notified that they were held liable for the price of the tobacco, were reasonably informed that the plaintiffs disavowed the note; and could have obtained it at any time on paying such price. Their insisting on retaining the fruit of their fraud, and their omission to pay the price and receive the note, perhaps should be deemed a waiver of any formal tender of the latter.

Be this as it may, there is no ground for saying that the defendants have been prejudiced by the failure to tender the note. They have never conceded the right to look to them for the price, and would not have accepted the note if a formal tender had been made. We will therefore adopt the practice sanctioned in *Nellis v. Bradley*, (1 Sandf. R. 560,) and consider the tender of the note at the argument, a sufficient compliance with the form insisted upon, without expressing any opinion as to the necessity of a tender in any stage of the transaction.

Judgment for the plaintiffs for the amount of the note, which is to be deposited with the clerk, for the defendants benefit on payment of the amount.

**THE MERCHANTS BANK v. C. M'INTYRE & Co.**

**Money paid under a mutual mistake of facts, may be recovered back.**

**Where a draft on a bank was presented for payment by a remote indorsee, to whom it was paid, both parties being ignorant of the fact, that the first indorsee to whom it was specially indorsed, had never indorsed the draft, but that a fictitious signature resembling his was placed on the draft; it was held, that on discovering the fraud, the bank could recover the amount from the party to whom it was paid.**

**Where an agent collects a negotiable draft as indorsee, without disclosing his agency to the drawer, he will be liable to refund the money to the drawer, on its appearing that it was paid on a fictitious indorsement, although the agent has, in the meantime, remitted the proceeds to his principal.**

**March 29th; April 7, 1849.**

**THIS was a case agreed upon between the parties for submission, without action, pursuant to the code of procedure.**

**On the 13th day of February, 1847, the bank of Mobile, at Mobile, in the state of Alabama, by T. M. English, cashier, on receiving \$250 from George G. Henry, delivered to him a draft or check upon the Merchants' Bank in the city of New York, addressed to their cashier, bearing the above date, and substantially as follows:**

**"\$250.**

**"At sight pay this my first check, second unpaid, to the order of G. G. Henry, No. 5612, two hundred and fifty dollars."**

**Signed by the cashier of the bank of Mobile, and the sum written across the face, and signed by the teller of the same bank.**

**This check was by G. G. Henry endorsed as follows:—"Pay to the order of Henry Harlan, Esq.—George G. Henry;" and was enclosed by him in a letter, addressed to Henry Harlan, Danville, Kentucky, and deposited in the post-office at Mobile.**

**The check was never received by, nor came to the use or knowledge of, Harlan.**

**In March, 1847, Charles M'Intyre & Co., the defendants, copartners in business in New York, received through the post-**

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office in New York the draft or check, with a further indorsement thereon, as follows :—" Pay to the order of Charles M'Intyre & Co.—Henry Harlan." The draft was inclosed in a letter addressed to them, containing instructions to fill an order for merchandize with the proceeds of such draft, after deducting their commissions. The defendants thereupon indorsed the draft as follows :—" Charles M'Intyre & Co.," and handed the same to their clerk, by whom it was immediately afterwards presented to the paying teller of the Merchants' Bank, in their banking-house, for payment. On such presentment the teller inquired of the clerk whether he was one of the firm of Charles M'Intyre & Co., to which the clerk answered "no." The teller then said, "we are not acquainted with that firm. You must get some person known to the bank to identify their signature, &c." The clerk then asked the teller whether he knew C. and E. W. Thwing. The teller answered "Yes, that will do." The clerk then left the bank with the draft, and went to the office of Edmund Charles & Son, one of whom wrote under the indorsement of Charles M'Intyre & Co., the following words : "Attested.—Edmund Charles & Son, 35 Wall-street." The clerk afterwards took the draft to C. & E. W. Thwing, one of whom wrote thereon, under the signature of Charles M'Intyre & Co., the words, "Correct.—C. & E. W. Thwing."

The clerk then returned to the Merchants' Bank, and presented the draft, with all these indorsements thereon, to the paying-teller, who thereupon received it, and paid the amount thereof (\$250,) to such clerk of Charles M'Intyre & Co., on the 13th day of March, 1847 ; and they, with the money so received, after deducting their commission, filled the order for merchandize above mentioned.

The draft or check never having been received or heard of by Henry Harlan, George G. Henry, on the 15th day of February, 1848, at Mobile, enclosed in a letter to said Harlan, at Danville, Kentucky, the second or duplicate of such check by him obtained from the bank of Mobile for the sum of \$250, signed by the cashier, and countersigned by the teller, in these words :

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"\$250.                      " Bank of Mobile, Mobile, Feb. 13th, 1847.

" At sight, pay this my second check, first unpaid, to the order of G. G. Henry, No. 5612. Two hundred and fifty dollars.

" T. M. ENGLISH, Cashier.

" To the Cashier of the Merchants' Bank, New York."

(Endorsed,)

" Pay to the order of Henry Harlan, Esq.

" GEO. G. HENRY."

This second check was received by Harlan, and was by him indorsed and delivered to the cashier of the Bank of Danville for collection, by whom it was indorsed, and sent to the cashier of the Bank of America in New York, who received it and presented it to the Merchants' Bank for payment. This presentation of the second check called the attention of the Merchants' Bank to the first check, and being satisfied upon inquiry, that the second check was regularly received and indorsed by Harlan, to whom both of the checks were indorsed by said Henry, and that the first check had never come to the possession or use, or knowledge of Harlan, but had been by some other person indorsed as above set forth, and sent to Charles M'Intyre & Co., as above stated; the Merchants' Bank paid the amount of the second check to the Bank of America.

The Merchants' Bank then, on the 10th of March, 1848, called upon Charles M'Intyre & Co. to repay to them the amount of the first check, who refused to make such payment. Both checks were produced and exhibited to the court upon the argument.

*B. W. Bonney* for the plaintiffs.

I. Money paid under a mistake of facts, may be recovered back in an action for money had and received. (*Bowyer v. Pack*, 2 Denio, 107; *Mowatt v. Wright*, 1 Wendell, 355; *Wait v. Leggett*, 8 Cowen, 195; *Bank of Orleans v. Smith*, 3 Hill, 560.)

II. The check in question, upon which the \$250 now sought to be recovered back, was paid by the plaintiffs to the defendants, was a genuine check, drawn by the Bank of Mobile on the plaintiffs, and duly endorsed by the payee to Henry Harlan.

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III. The plaintiff's teller paid the money in question, in the belief that the defendants were lawful holders of the check by indorsement of the first indorsee. This was a mistake as to the fact, and the plaintiffs may recover back the money so paid. (*Canal Bank v. Bank of Albany*, 1 Hill, 287; *Coggill v. The American Exchange Bank*, 1 Comstock, 113; *Talbot v. Bank of Rochester*, 1 Hill, 295.)

IV. By presenting the check and demanding payment, and when their right to receive the money was questioned, procuring certificates to obtain it, the defendants affirmed themselves to be the lawful holders of the check, and entitled to receive payment thereof. Upon this affirmation, and believing it to be true, the plaintiffs paid the money, which they may now recover back, it being conceded that defendants had no title to the check.

V. The plaintiffs have been guilty of no laches. As soon as informed that the indorsement of the check was a forgery, they gave notice to the defendants, and demanded back the money paid.

VI. The defendants will not suffer loss from being compelled to repay the money. They will be entitled to recover the same amount from their correspondent, from whom they received the check, and whom, it is to be presumed, they know. (*Canal Bank v. Bank of Albany*, 1 Hill, 287.)

VII. The plaintiffs are entitled to judgment for the money paid, (\$250,) with interest, from March 13, 1847.

*C. C. Egan*, for the defendants.

The plaintiffs must bear the loss occasioned by their negligence. They paid the check, although not negotiated; the name of the first indorsee not being on the check at all.

If they have any right of action, it is not against the defendants, who acted merely as agents, in entire good faith, and who have paid over the money to their principals. Both parties had equal knowledge of the facts. (*Potter v. Evans*, 2 Hall, 252; *Mowatt v. Wright*, 1 Wend. 355; 3 Wend. 72; 4 Cow. 454.)

*Bonney*, in reply.

The plaintiffs knew nothing of the agency. If there were a



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mutual mistake, we are entitled to recover; if the defendants were acquainted with the state of the case, it was a fraud. The defendants presenting the draft for payment, may be regarded as an averment that it was payable to *Henry Harden*. The name written on the first check would readily be read as *Harlan*.

**BY THE COURT. OAKLEY, CH. J.**—The indorsement on the first draft, is certainly in a name different from that of the first indorsee, Harlan; and the inquiry is, were the defendants under the circumstances bound to refund the money which they received from the plaintiffs. They rely on two grounds to defeat a recovery.

*First.* They say they acted as agents merely in the transaction, and transmitted the proceeds of the draft to their correspondent, in ignorance of the fact that the draft was not properly indorsed, and before they were called upon to refund.

How the law would be in this respect, if the fact of their agency had been known to the Merchants Bank when they paid the draft, we need not say. But their agency was not known. The defendants did not communicate it to the plaintiffs, and they not being apprised of any agency, dealt with the defendants as the owners of the draft, and may now treat them accordingly.

*Second.* It is contended that there was palpable negligence in the acceptance and payment of the draft by the bank, because it was manifest on inspection, that the indorsement was fictitious.

It is a general principle, undoubtedly, that where the drawee of a bill pays it negligently, and without proper precaution, he is remediless, if it turn out that the signature of the drawer, or of any indorsee, be forged. The drawee is bound to use reasonable diligence, or the consequences will fall upon him. The peculiar feature of this case is, that the defendants first acted on the faith of the genuineness of this indorsement, and gave the sanction of their own signature to the genuineness of all the indorsements previous to their own. It is contrary to reason and principle, that they who with better opportunity to know

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the true state of the case, and who presented the draft for payment as being the rightful holders and authorized to receive it, should after its payment by the drawees, set up that the latter, because they paid under a defective authority, must lose the amount. The defendants either knew of the defect, and are thus responsible for the fraud; or they were at least equally negligent with the plaintiffs. If we assume the latter ground, it is the ordinary case of mutual ignorance of an important fact, which if it had been known to either of the parties, would have prevented the negotiation from going into effect. In such a case, either party may rescind, and thus the plaintiffs are entitled to recover.

This is in accordance with our decision in several cases recently. We hold it to be a principle of universal application, that where one presents a draft or check to a bank for payment, it is a representation of the genuineness of the signatures appearing upon it. And except where the drawer's signature is forged, or there is some other peculiar reason for taking the case out of the rule, the party so presenting the draft will be held responsible to the drawee for the authenticity of such signatures.

Judgment for the plaintiffs.

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BEVINS v. REED.

In an action to recover of a stakeholder money staked with him by the plaintiff, on a wager upon the event of a horse race, the defendant cannot set off the amount of a deposit made by him with the plaintiff, upon another wager of a similar character.

The statute having declared wagers unlawful, and every contract respecting them void, the sole remedy of a party depositing money upon a wager is by a suit, under the statute, to recover back the money deposited. He cannot recover it without suing for it, by way of a defence or set off in a suit brought against him.

There is no indebtedness, in such a case, from the stakeholder to the depositor. There is merely a right, on the part of the latter, to sue the former, in accordance with a strict statutory grant of relief where no other remedy exists.

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Aside from the language of the statute, giving to a party depositing money upon a wager a remedy by suit against the stakeholder, his right to recover back the amount of his deposit is not a demand which can be set off; it not being a demand arising upon judgment, or upon contract, express or implied.

March 29 ; April 7, 1849.

THIS was an action brought under the statute, to recover the sum of \$250, being the amount of a bet made by the plaintiff with one Darragh, in the month of December, 1847, the money being deposited with the defendant, as stakeholder.

The declaration contained the common counts, and a special count under the statute. The plea was the general issue, with a plea and notice of set off, to the effect, that in December, 1847, the defendant had also deposited with the plaintiff, as stakeholder, the sum of \$250, being the amount of a bet made by the defendant with one Riley. The cause was tried before Justice SANDFORD and a jury, on the 4th day of January, 1849.

Upon the trial, it appeared in evidence that in the month of December, 1847, the plaintiff and one John Darragh entered into a bet of \$500, upon the result of a race between Lady Suffolk and Lady Sutton, two trotting mares. By the terms of the bet, \$250 were to be put up as a forfeit on each side, and these sums were accordingly deposited with the defendant, but subsequently the bet was withdrawn. The plaintiff proved that he had demanded from the defendant the amount of his deposit, which the defendant refused to pay.

The plaintiff rested his case, and the defendant thereupon offered to prove the facts contained in his plea and notice of set off, to which testimony the plaintiff objected, on the ground that it was not a matter of set off, but was merely a penalty, and could only be recovered in the manner prescribed by statute. The court refused to admit the testimony, and the defendant excepted. The defendant then proposed to prove payment, under the first plea and notice; and for this purpose, he called Charles Riley, who testified that in December, 1847, the defendant had made a bet with him, that he, the defendant, had some time previous, obtained a certain horse named Betsey Baker to trot a race with Grey Harry, and that the money was deposited by both parties with the plaintiff. This witness tes-

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*Bevins v. Reed.*

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tified that the bet was decided in his, the witness' favor, and that the plaintiff had paid him the money. As to this point, however, there was some conflict in the testimony. There was some further testimony on the part of the defence, but not material to be mentioned.

The court charged the jury, that the defendant could not offset the \$250, deposited by him with the plaintiff on his bet with Riley, and that the only question for them to pass upon, was whether the \$250 deposited by the plaintiff with the defendant, had been repaid or not; that the wager itself was illegal, and in addition, the match on which it was staked, had been withdrawn. The court further charged, that if the jury found that the precise and identical money which the plaintiff lodged with the defendant, had been staked by the defendant in the plaintiff's hands, it would be a good payment; that in such a case, the law would refer the defendant's act in staking the money with the plaintiff, to an intent to restore the plaintiff's deposit, rather than to an intent to commit a further illegal act; but as to this, the testimony was very slight. The jury found a verdict for the plaintiff.

*James Green*, for the plaintiff.

1. The judge was correct in refusing to allow the defendant to prove his second plea, because it was not a matter of set off.

2. The bet between the defendant and Riley was void, and could not be recovered from the plaintiff, except in the manner prescribed by statute. (*McKeon v. Caherty*, 1 Hall Rep. 300.)

*J. Howe*, for the defendant.

1. The set off should have been allowed. It was a debt without action, and a proper subject of set off. (2 R. S. 351, secs. 1 and 2.) The statute authorizes a party to sue for such a debt. (1 R. S. 662, sec. 9.) It prescribes no particular form of action; and to avoid multiplicity of suits, a party may recover by set off as well as by bringing an original action. Furthermore, the bet of the defendant was as an event that had happened, not a contingent or future event within the prohibition of the statute.

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2. The judge erred in charging, that the jury must find that the identical money was returned. It was sufficient that the plaintiff received the same amount.

BY THE COURT. SANDFORD, J.—The only point presented by the case, is on the rejection of the defendants proposed set off. The issue made by the plea of set off, is upon the plaintiff's *indebtedness* to the defendant, in respect of the money staked by the latter in his hands.

It was said the defendant's bet was not upon any future or contingent event, and was therefore legal. This conclusion is, however, wholly erroneous. The statute against betting and gaming, forbids wagers on any unknown event, and the subject matter of this wager was of that description. By the statute, all such bets are unlawful, and all contracts for or on account of the money or thing bet or staked, are void. (1 R. S. 662, sec. 8.)

Thus, there was no contract, express or implied, touching the money deposited with the plaintiff, and independent of the section of the statute next mentioned, the defendant had no redress against the plaintiff to recover it back, whether it were lost or won. The ninth section provides, that any person who shall pay or deliver any money, &c., on the event of any wager prohibited by the act, *may sue for and recover the same* of the winner and of the stakeholder.

On this it is claimed that the defendant had a debt or demand against the plaintiff, for which he was at liberty to bring assumpsit, and which he could therefore set off.

We think this position is not sustained. It is not important to consider whether or not assumpsit could have been brought under the statute. But we are entirely clear, that there was no debt due from the plaintiff to the defendant, when this suit was brought. The statute having declared that the wager was unlawful, and every contract respecting it void, the defendant's sole remedy was by a suit to recover back the money deposited; and this remedy existing only by force of the statute, could be obtained only in the manner which it prescribed. The defendant might *sue for it*, but there is nothing in the law which will

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enable him to recover it without suing for it, by way of a defence or set off in a suit against him.

In *McKeon v. Caherty*, (1 Hall, 300,) this court decided, under the revised laws of 1813, that assumpsit could not be maintained to recover back money staked on a wager, because the act gave a remedy by an action of debt, and there was no common law remedy to recover the money. The revised statutes make no change in the law in this respect, except that they are silent as to the form of the action. The case cited is therefore an authority in support of our conclusion that there was no indebtedness from the plaintiff to the defendant. There was merely a right to sue the plaintiff, in accordance with a strict statutory grant of relief, where no other remedy existed.

It is equally clear, aside from the language of the act, giving merely a suit, that this right was not a demand which could be set off. It was not a demand arising upon judgment, or upon contract express or implied ; (2 R. S. 354, sec. 18 ;) which is an essential requisite to authorize a set off.

Motion for new trial denied.

The motion for a new trial on the ground of surprise, and newly discovered evidence, is also denied.

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#### GASSNER v. SANDFORD.

*Nul tiel record*, pleaded in an action of debt on judgment, is a plea of the general issue, within the provision of the statute authorizing notice of special matter to be given whenever the general issue is pleaded.

The statute authorizing a defendant to give notice of his defence, instead of pleading it, is a remedial act, and should be construed liberally.

In an action of debt upon a judgment, brought after a great lapse of time from the entry of the judgment, it is competent for the defendant to show that an execution was issued upon the judgment soon after its recovery ; that the defendant had property which could be reached by the process ; that the officer having charge of the same is dead, and his papers missing ; and that the execution has not been returned to the proper office. These facts unexplained, will warrant a jury in finding for the defendant.

March 29 ; April 7, 1849.

THIS was an action of debt, brought to recover the amount of a judgment recovered in the court of common pleas for the city of New York, in the year 1828, for the sum of \$222 30. The declaration set forth the judgment, to which the defendant pleaded *nul tiel record*. Annexed to this plea, was a notice of special matter, viz. : that on the first day of July, 1828, the defendant fully paid and satisfied the sum claimed in the declaration. The cause was tried before Chief Justice OAKLEY and a jury, on the 5th day of January, 1850.

Upon the trial, the plaintiff introduced in evidence a record of a judgment recovered in the court of common pleas, by the plaintiff against the defendant in the May term of the court in the year 1828, for \$222 30. The interest upon the said judgment was admitted to be \$318 93. The plaintiff thereupon rested.

It appeared in evidence on the part of the defendant, by the testimony of Andrew Warner, who had been for eighteen years a clerk in the office of the clerk of the city and county of New York, that from an entry in the precipe book in July Term, 1828, a *fiери facias* for \$222 30, was issued against the defendant at the suit of the plaintiff, and that no entry was made in the precipe book of its return. That whenever writs were returned, an entry of such return was always made.

The plaintiff's counsel objected to any evidence of the issuing of the execution, which objection was overruled, and the plaintiff excepted.

It further appeared by the testimony of Henry Tysen, who had been an assistant in the office of the sheriff for sixteen or eighteen years, that the sheriff was in charge of the defendant's property, consisting of his household furniture, library, and the wardrobe, scenery, printing office, and other movables of the Lafayette Theatre, and the horses, wardrobe and scenery, of the Mount Pitt Circus. That Mr. Platt was the deputy, and p'aced the witness in charge of the property in October, 1848; that he remained there about one hundred days, until the property was sold. The sales were made at different times. That some time after the sale, Mr. Platt died very suddenly, and his papers could never be found.

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There was some further testimony as to the sale of the defendant's property.

William Lowerre, the attorney who recovered the original judgment, testified to his having issued an execution on the day of its rendition, and that there was no entry in his register of its return. Being cross-examined, he said he had never learned from the sheriff whether a levy had been made; and that he had never received the money, and never learned that it had been collected.

The defendant rested, and the plaintiff's counsel called the defendant, who testified, that in the winter and spring of 1829, all his real and personal property had been sold by the sheriff; that he did not know what the proceeds of the sale were; nor whether the sheriff had ever received the amount of the execution upon the judgment in this cause; nor whether there were proceeds sufficient to pay it. In answer to a question by the judge, the witness testified that his property, if sold at a fair value, would have been sufficient to pay all his debts.

The judge charged the jury, that under the circumstances of the case, although twenty years had not elapsed, they had a right to infer payment, and if they did, they must find for defendant; otherwise, for plaintiff. The jury rendered a verdict for the defendant.

*Slosson and Schell*, for the plaintiff.

*B. L. Billings*, for the defendant.

BY THE COURT. SANDFORD, J.—The defendant is permitted to give notice of any matters which if pleaded, would be a bar to the action, whenever he shall plead the general issue, in any action in which such issue may be pleaded, (2 R. S. 352, § 10;) and the principal point presented by the case, is whether *nil tiel record* pleaded in an action of debt on a judgment, is such a general issue.

The subsequent provision in the same section, extending the privilege of giving a notice to *nil debet*, pleaded to debt on judgment, and to *non est factum* in covenant; does not aid the



plaintiff, nor does it assist us much in our inquiry. It is only to foreign judgments, and domestic judgments recovered in courts not of record, that *nil debet* can be pleaded. The revised statutes extended the notice of defence to this class of cases, without intending to extend the plea of *nil debet* to cases in which it was not previously a proper plea. (*White v. Converse*, 20 Wend. 266.) And as the legislature was aiming to enlarge the privilege of giving notice, and expressly conferred it in the action upon judgments in which *nul tiel record* is not pleadable, it is perhaps a fair inference, that they deemed the latter plea to be a general issue in actions on domestic judgments of record.

Previous to the revised statutes, *nul tiel record* was not a general issue. (*Bullis v. Giddens*, 8 Johns. 82; *Raymond v. Smith*, 13 Ibid. 329) The reason was, that it was triable by the court at bar, and not by a jury. By the revised statutes, this is changed, and the existence of the record, when denied, is to be tried by a jury as an issue of fact. (2 R. S. 409, § 4; *Trotter v. Mills*, 6 Wend. 512.)

The reason of the former rule no longer exists, and we cannot perceive why the rule itself should continue. The record of the judgment declared on, is the whole basis of the plaintiff's action. The denial of the existence of the record, puts his whole claim in issue. This, it seems to us, fully answers the description of a general issue.

The courts have repeatedly declared, that the statute authorizing notice of the defence to be given, instead of pleading it, is a remedial act, and should be construed liberally. In *Mervin v. Kumbel*, (23 Wend. 301,) where this was said by Bronson, J. he added, "I think the statute meant to turn the plea of *nul tiel record* into a general issue upon the original cause of action." He was, it is true, speaking of the plea when put in by a joint debtor, not served with process in the original suit; but if it were a general issue to the original cause of action, it surely could be no less to the action properly founded upon, and supported by the judgment.

In *Wilmarth v. Babcock*, 2 Hill, 195,) the court said a partial defence might be given in evidence on the trial upon the issue of *nul tiel record*; which could not be so unless that plea was

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 Strong v. Dollner.
 

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the general issue. This plea is ranked as a general issue in the books of practice, since the revised statutes. (Graham's Pr. 196, 198 ; Burrill's Pr. 164.)

Our conclusion is, that the notice of special matter was properly appended to the plea of *nul tiel record*, and that the evidence in support of it was correctly admitted on the trial.

We have no doubt that the proof was competent under the notice, and sufficient to establish the defence. (*Miller v. Smith*, 16 Wend. 425.)

Motion for new trial denied.

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 STRONG v. DOLLNER & POTTER.

The plaintiff was the grantee of premises occupied by the defendants, at the time of his purchase, under a lease from the grantor. The deed to the plaintiff was subject to a mortgage upon the premises, and was unrecorded. The defendants had attorned to the plaintiff, and paid rent to him. Subsequently the mortgage was foreclosed, but the plaintiff was not made a party to the suit. The premises were sold by a master, on the 7th of April, and bid off by M., under whom the defendants claimed ; but M. did not pay the purchase money, until the 5th of May, when he took a deed from the master, and had it recorded. In an action by the plaintiff to recover the rent due on the 1st of May next after the sale ; *Held*, that his claim to the rent was unaffected by the foreclosure proceedings, and that his title remained valid until it was divested by the recording of the master's deed.

*Held also*, that the recording of the master's deed had no relation back to the time of the sale, so as to divest rights of action previously accrued to the plaintiff by virtue of his unrecorded deed.

Although the recording act makes an unrecorded conveyance void as against a subsequent purchaser in good faith, for value, whose deed is recorded first, it does not avoid the former as of a time prior to the execution of the latter. It does not transfer to such subsequent purchaser rights in respect of the property, against third persons, which were vested in the owner holding under the unrecorded deed, prior to the execution of the subsequent conveyance.

A bid at a master's sale, its acceptance by the master, and the payment of a percentage upon the purchase money, work no change in the title, even in equity. The purchase is inchoate and defeasible until the acceptance of the title, on his part, and the confirmation of the report of sale, on the part of the court.

March 15 ; April 21, 1849.

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Strong v. Dollner.

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THIS was an action on the case for use and occupation of the premises No. 166 Front street, in the city of New York, for one quarter due May 1, 1847. The amount claimed was \$250. The declaration contained three counts, one for use and occupation generally; the second claimed to recover by virtue of a lease of the premises from B. W. Strong to the defendants, for one year from May 1, 1846, at a rent of \$1000, and an assignment of the lease from Strong to the plaintiff, executed October 13, 1846; the third, claiming it as the grantee of Benjamin W. Strong, by deed of the premises, bearing date October 7, 1846. The defendants pleaded the general issue.

Upon the trial of the cause, it appeared in evidence by the testimony of Dollner, one of the defendants, that the premises in question were hired by the defendants from B. W. Strong, for one year from May 1, 1846, at a rent of \$1000, under a written lease; that the first quarter's rent was paid to the lessor; that the second and third quarters were also paid, and as appeared by the receipt book of the defendants, receipts were given signed by B. W. Strong for Peter R. Strong, the plaintiff, but the last quarter's rent had not been paid. The plaintiff then offered in evidence, a deed of the premises from B. W. Strong to the plaintiff, dated October 7, 1846, duly acknowledged, without any covenant, and subject to a mortgage upon the premises, given by the grantor to Susan Remsen, for \$10,550, payable April 20, 1846. This deed had never been recorded.

The plaintiff thereupon rested, and the defendants' counsel read in evidence a deed of the premises in question, from Philo T. Ruggles, master in chancery, to Thomas H. Mills, dated May 5, 1847, executed pursuant to a sale of the premises made by him April 7, 1847, under a decree for the foreclosure of the mortgage of B. W. Strong to Remsen, which mortgage, by sundry assignments, had become vested in William J. Schenck. It further appeared, that the bill of foreclosure and notice of *lis pendens* were filed December 31, 1846, and sundry judgment creditors of B. W. Strong were made parties to the suit, but the plaintiff in this suit was not; that a decree of foreclosure was entered March 9, 1847, which was enrolled April 14, 1847. The defendants then offered in evidence, a lease of the premises

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from Thomas H. Mills to the defendants, dated April 13, 1847, for one year from the first of May thereafter, and proved the same by Dollner, one of the defendants, who also testified, that at and before the delivery of the lease, Mills requested the defendants to pay him the rent due on the 1st of May.

The plaintiff's counsel objected to this testimony as irrelevant, and because it was of a date before Mills had acquired title to the premises.

The defendants having rested, the plaintiff's counsel called Philo T. Ruggles, who testified that the master's deed was not delivered till the 5th of May, and that the purchase money was paid on that day; that there had been no demand for the deed, or offer to pay the money by Mills before that day. It appeared by the testimony of the solicitor of Thomas H. Mills, that the delay in closing the contract of sale was owing to some impediment in the title, and that Mills was ready at any time to pay the purchase money, and that 10 per cent. had been paid by him to the master, on the day of the sale.

The testimony having been closed, a verdict was taken for plaintiff, for \$266 75, subject to the opinion of the court on a case.

*J. Lynch*, for the plaintiff.

*A. C. Bradley*, for the defendants.

BY THE COURT. SANDFORD, J.—The defendants attorned to the plaintiff, after the lessor conveyed to him, and he is clearly entitled to receive the rent which became due on the first of May, 1847, unless the defendants have shown that his title was divested before that day. It is claimed that this is shown by the foreclosure and the master's deed. It is not supposed that the decree of foreclosure, or even the master's sale, affected the legal title; and the master's deed was not delivered, until the fifth day of May. Nor is this the whole difficulty in the defendant's point. The decree, the sale, and the deed, all combined, did not affect the plaintiff's title in the least; because he was not made a party to the foreclosure suit. (*Watson v.*

*Spence*, 20 Wend. 260.) It is only because the master's deed was recorded, and the plaintiff's was not, that the former operated to divest his title. Therefore, looking at the facts as they existed when the price was paid by Mr. Mills and the deed delivered, there was no reason whatever to prevent the plaintiff from collecting this rent. His right to it was as perfect as it was to any other thing in action in his hands overdue. At the end of the next quarter, it is true, the tenants could have successfully resisted his right to recover the rent, not because the decree and sale affected him, but because during the quarter, the recording of Mr. Mills' deed made his unrecorded deed void as against the former.

The plaintiff's right was cut off by the recording of the master's deed. All that went before, failed to have that effect. The deed was perfect, and as operative as the decree could make it, upon its delivery by the master; yet up to that stage of it, the plaintiff's legal title had not been touched. The act of recording the master's deed, which had the effect to give Mr. Mills the better title, derives its force solely from the recording act, which has no relation back to divest rights of action accrued to the owner holding by the unrecorded deed. For example, if the plaintiff, on the second of May, had commenced an action of trespass for injuries done on the preceding day to the freehold of these premises, it would have been no defence on the trial, that on the fifth of May, Mr. Mills had received a deed from a former owner, which he had placed on record, and the plaintiff's deed never having been recorded, his title was divested in favor of Mr. Mills.

Although the recording act makes an unrecorded conveyance void against a subsequent purchaser in good faith for value, whose deed is recorded first; it does not avoid the former as of a time prior to the execution of the latter. It does not transfer to such subsequent purchaser, rights in respect of the property against third persons, which were vested in the owner holding under the unrecorded deed, prior to the execution of the subsequent conveyance.

The defendants insist that the equity of Mr. Mills was superior to that of the plaintiff, and therefore the recording should

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Strong v. Dollner.

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have effect by relation, to the date of the master's sale. We do not perceive that there is any such superior equity. The plaintiff was the owner of the equity of redemption, and was compelled to pay interest on the mortgage debt until the entire purchase money was paid in by Mills on the fifth of May; or which is the same thing, such interest was taken out of the proceeds of the sale, the surplus of which presumptively belonged to the plaintiff. On the other hand, Mr. Mills could at any time have withdrawn from his bid, on account of the defect of parties in the foreclosure; he did not elect to complete his purchase until the fourth of May; and he did not pay the price till the fifth.

It was argued with great ingenuity, that the master's deed related back to the sale by which the contract of purchase was made, and in equity dates from the agreement to purchase. If this were conceded, it might fall short of reaching the legal title, which is alone in question in the action for use and occupation. But we think the proposition cannot be maintained.

The bid at the sale, its acceptance by the master, and the payment of the ten per cent., wrought no change in the title, even in equity. The ten per cent. was a mere security for the good faith of the bid, and it would have been refunded, if the purchaser had refused to complete, on account of the defect in the proceedings. His purchase was entirely inchoate and defeasible, until the acceptance of the title on his part, and the confirmation of the report of sale on the part of the court. (See *Brown v. Frost*, 10 Paige, 247.) The contract was not complete as to the purchaser himself, until he paid the whole price. If he had paid the price on the 20th of April, the day fixed for that purpose in the terms of sale, he would from that time have been the equitable owner of the premises, and as against the parties to the foreclosure, might have intercepted the rents falling due afterwards. But to do this, he would have required an order of the court of chancery, operating upon the parties in the suit.

As he did not pay till the fifth of May, we think he cannot, even in equity, be deemed the purchaser as of a date prior to the time when he was bound to complete his purchase. The

rule in the English court of chancery is, that the purchaser is entitled to rents from the quarter day next prior to his payment of the purchase money. (Hoffman's Master's Pr. 231 ; 2 Dan. Ch. Pr. 913 ; and the cases cited.) And it makes no difference that the money has been ready from the time the premises were struck off, and has been lying unproductive. (*Barker v. Harper*, Cooper's Rep. 32 ; 1 Barb. Ch. Pr. 530 ; 2 Smith's Ch. Pr. 177.)

In the case of the sheriff's deed, cited by the defendants, the seizure and sale of the land does not divest the title of the debtor. The payment of the purchase money and the deed must concur ; and there is no case where the doctrine of relation, in respect of such deeds, has been extended back to a period anterior to such payment. *Catlin v. Jackson, ex dem. Gratz*, 8 Johns. 520, 550 ; *Lathrop v. Ferguson*, 22 Wend. 116.) In the case last cited, Cowen, J., says, the whole doctrine is a fiction, to prevent fraud ; and if a person neither having, nor assuming to exercise, any control in preventing the performance of the contract or sale, acquire a legal and executed right, which is prior in time, he is deemed prior in law and equity, and entitled to hold without prejudice from the fiction.

Again, if there were any relation to the time of sale, or the day fixed for completion, such relation was perfect when the price was paid, the master's deed delivered, and the sale confirmed. Yet stopping there, Mr. Mills would not have been able to obtain possession of the premises from the plaintiff and his tenants, much less to divest the rent due to the plaintiff. It was the recording of his deed alone, that enabled him to obtain possession.

These considerations are conclusive against giving to the master's deed the retrospective operation claimed for it, and the plaintiff is entitled to judgment.

Judgment for plaintiff.

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Bell v. Leggett.

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**BELL, Survivor, &c. v. LEGGETT'S EXECUTORS.**

Under the bankrupt act of 1841, a friend of a person applying for his discharge as a bankrupt, may buy the debt of an opposing creditor, so as to remove such opposition; provided the bankrupt himself is neither a party, nor privy to the arrangement, and his effects are not to be made liable for the purchase.

Accordingly, where a bankrupt debtor applied for his discharge under the act, which discharge was opposed, and thereupon the father-in-law of the petitioner, without his knowledge or connivance, arranged with the opposing creditors to give them his own notes, in satisfaction of their claims, and to take an assignment of their judgments against the bankrupt, as soon as the bankrupt should receive his discharge; and, in pursuance of that arrangement, the opposing creditors withdrew their opposition, and the bankrupt obtained his discharge; *Held*, that such notes were valid, and upon a sufficient consideration, and that an action lay thereon.

March 14, 15; April 28, 1849.

THIS was an action of assumpsit brought by the plaintiff, as survivor of Jacob Harvey, upon two promissory notes made by Samuel Leggett, deceased, dated December 12, 1845, one for the sum of \$579 37, payable in six months, and the other for the sum of \$586 41, payable in nine months. The defendants are the executors of the last will and testament of Samuel Leggett.

Upon the trial, the notes were read in evidence, and proved. The plaintiffs proved by the counsel of the testator, that he received from the testator the notes in suit, together with several others, to be delivered to the plaintiffs upon their executing to him assignments of certain judgments which they held against Barney Corse, a son-in-law of the testator; that Corse was at that time an applicant for a discharge under the bankrupt law, and the notes were to be delivered when he should receive his discharge. The notes were delivered to Mr. Gerard, the counsel for the plaintiff, after the discharge of Corse, and the assignments of the plaintiffs' claims against Barney Corse were delivered to the counsel for the testator. The assignments bore date November 12, 1846.

The plaintiffs then rested, and the defendants offered to show by way of defence, that the consideration of the two notes in



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suit was the withdrawal by the plaintiffs of their opposition to the discharge of Barney Corse from his debts, under the bankrupt law, which discharge Corse was then applying for, and which the plaintiffs opposed as judgment creditors. The plaintiffs objected to the evidence, but the court admitted the evidence.

It appeared in evidence, on the part of the defendants, that Barney Corse filed his petition in bankruptcy on the 23d of February, 1842. That the plaintiffs, with two other judgment creditors, filed their dissent, June 12, 1842, and also their objections to the discharge of the petitioner. The opposing creditors proved their debts in due form. The ground of objection, on the part of the opposing creditors, was that a debt of \$100,000, set up by Barney Corse upon a bond executed to his father, was a false and fictitious debt. The issue thus raised was tried before a jury, in June, 1843. Upon this trial, the jury disagreed. A *venire de novo* was awarded, and a second trial had, when the jury again disagreed. A third trial resulted in a verdict against Mr. Corse. An attempt was made to get rid of the verdict, which was unsuccessful. Subsequently, and in the year 1845, the testator, Samuel Leggett, left with his counsel, the notes in suit, with other notes, which were to be delivered to the plaintiff and the other opposing creditors, upon Corse receiving his discharge, and on such creditors executing to him assignments of their claims against Barney Corse.

The counsel of Samuel Leggett testified, that the counsel of the opposing creditors knew of the notes having been left with him, and the terms on which they were left; that they consulted together about the best way to get the judge to grant the discharge; and finally, that a consent was given to withdraw all opposition. The discharge was obtained, April 27, 1847. Afterwards, and on the 20th of May, the notes were delivered by the counsel of the testator, and he received the assignments. The witness further testified, that he stated to the counsel of the opposing creditors the terms on which he had received the notes, and that all objections to the discharge of Corse were thereby removed.

It was admitted, that Barney Corse was not a party to the

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arrangement made by Samuel Leggett, and that it was made without his connivance, collusion, or knowledge.

It was contended, on the part of the defence, that the notes being given in consideration of the withdrawal of opposition on the part of the plaintiff, to the discharge of Barney Corse, were void, as being against public policy.

The judge, reserving the questions of law, submitted the facts to the jury, to determine whether the withdrawal of the opposition of the plaintiff to the discharge of Barney Corse under the bankrupt law, formed a part of the consideration of these notes, instructing them, if they found the fact so to be, to bring in a verdict for the defendants. To which decision and charge, the plaintiff excepted. The cause was thereupon submitted to the jury, who found a verdict for the defendants.

*T. C. T. Buckley*, and *J. W. Gerard*, for the plaintiff.

I. The purchase of a judgment from an opposing creditor, by a stranger, without the knowledge, privity, or assent of the bankrupt, and the consideration not to come from the bankrupt or his assets, is not rendered void, either by the bankrupt act, or by any principle of the common law, as being against public policy.

II. Whether the time on which the note is to run, given by the stranger for the consideration of the judgment, dates from the day of the purchase, or the day when the bankrupt may get his discharge, makes no difference. If the note is good in the first case, it is equally so in the second. In both cases, the motive to continue the opposition would fall to the ground by the act of purchase. The notes were not given for any bonus for withdrawal of opposition, or even for the amount of the debt, but for less than 15 per cent. of the debt. (5 Taunt. 117; 1 Pr. Wms. 620.)

III. The cases in which notes were given for withdrawing opposition to an insolvent or bankrupt's discharge are void, are where the agreement is made by the bankrupt, or with his privity, or where his assets are to go to the creditor for his withdrawal of his opposition. (*Kaye v. Bolton*, 6 T. R. 34; Bankrupt Law of 1841, sec. 4; *Jackson v. Davison*, 4 B. & A. 691.)

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As a perfect test of the legality of the notes, could Barney Corse's discharge be defeated on account of the transaction, by any creditor? If not, the notes cannot be impeached. (3 Denio, 10; 1 Ibid. 195; 2 Metcalf, 57; 3 Story R. 507; 10 Alabama R. 523.)

IV. If the law is otherwise, and as the judge ruled it, there is no proof that the withdrawal of the opposition was part of the bargain or consideration of the notes; such inference cannot be raised from the mere fact that the notes were to be dated when the discharge was obtained.

V. No such inference could be deduced from the acts of the counsel of the opposing creditors.

VI. On a question of the transaction being against public policy, the court and jury should look at the whole transaction.

After a third trial, the jury found that the bankrupt had admitted the mortgage as a false and fictitious debt. In July, 1845, the highest possible evidence was given, that that could not have been, for the very mortgage was foreclosed, and property to the amount of \$100,000, was transferred under it, and the validity of the mortgage unquestioned. It was after this, that the plaintiffs sold their judgments, and the opposition was withdrawn by the counsel.

VII. The acts of the counsel of Messrs. Bell and Harvey, after the month of December, 1845, could not take away the prior vested rights of the plaintiffs.

If the transaction was good when the notes were made, no subsequent acts or declarations of counsel could affect the plaintiffs; especially when they were without their consent or knowledge.

VIII. The verdict was rendered by the jury, under a misapprehension that it was only a matter of form, and that the court was to settle the cause as on a case reserved. The jury were equally divided, and declared in open court, that they never could agree.

*Wm. Kent*, for the defendants.

I. The debt of the plaintiff against Barney Corse having been duly proved under the bankrupt proceedings, the remedy of the

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plaintiff was thenceforth confined exclusively to the dividend under the bankrupt proceedings ; and the property assigned by Corse being obviously insufficient to pay the assignee's expenses, the judgments of the plaintiffs were of no value whatever ; and therefore the notes given by Samuel Leggett were without consideration.

II. The notes in suit having been given in consideration of the withdrawal of opposition by the plaintiff to the discharge of Barney Corse, under the bankrupt act, the notes are void, as contrary to the spirit of the bankrupt act, and as against public policy and public justice.

If the last mentioned consideration was not the sole consideration of the notes, yet they are void.

BY THE COURT. SANDFORD, J.—The principle has long been established in this state, by a series of authorities, that a security given by a friend of an insolvent, pending his application for a discharge from his debts, to induce a hostile creditor either to join in the petition for such discharge, or to withdraw his objections to its being granted, is void, as being contrary to the policy of the insolvent law. All the cases to which we have been referred, arose under the statute for discharging an insolvent from his debts, upon the application of two-thirds of his creditors ; and in all, the arrangement was made by the insolvent himself, or through his intervention.

Our decisions were founded upon those made in England, under the bankrupt act 5 Geo. 2, by which the debtor was prevented from obtaining his certificate, unless four-fifths of his creditors united in a petition that it should be granted. The act also made it unlawful for the bankrupt, or for any person, to give any money or property to a creditor to induce him to sign the certificate. The subsequent bankrupt acts reduced to three-fifths the proportion of the creditors necessary for a discharge. Under these acts, it was held in England, nearly a century ago, and such has been the law ever since, that a bond given by a relative of the bankrupt to a creditor, who would not otherwise sign the certificate, was illegal and void. The decisions were in accordance with the positive enactment of the

statute ; but when a case arose, not within the provision, though against the policy of the act, Lord Tenterden said the security was not void, and a *bona fide* holder might recover upon it. (*Birch v. Jervis*, 3 Carr. & P. 379.)

It will be observed, that in respect of the conjunction of a large proportion of the creditors in making a certificate effectual to discharge the bankrupt, the English bankrupt acts are entirely analogous to our statute for the discharge of an insolvent debtor, on the petition of two-thirds of his creditors. And the principle upon which preferences and purchased assents, should be deemed invalid, is equally applicable to both. There are cases in which securities have been adjudged void ; but it is not, under the circumstances, necessary to advert to them in detail. All the authorities are founded upon one or the other of the grounds, that the payment or security made to the favored creditor, is contrary to the provision of the statute, detrimental to the rights or interests of third persons, oppressive upon the insolvent, or a fraud upon his other creditors.

In the instance of the bankrupt certificate in England, and the petition of two-thirds of the creditors under our insolvent act, the signature of each creditor by turn, has its influence upon others to whom the instrument is presented. It may induce some to concur by its example of generosity, and may lull the vigilance of others by its apparent assent to the justice of a discharge.

In instances of composition deeds and the like, which are parallel in principle, as well as in those last referred to, if the sum paid or promised to the favored creditor, be from the bankrupt's own funds, it is a direct fraud upon the other creditors, in diminishing the dividend they would otherwise receive. Or, if given after the discharge, on a promise or obligation made previously, it is an unfair advantage taken of the debtor ; and may be open to the remark, that it diminishes the chance of all the other creditors of receiving payment out of his future acquisitions, if he should be so honest as to discharge his moral obligations. The late bankrupt act of 1841, has no provision analogous to those upon which we have commented, contained in our insolvent law and the English bankrupt acts. In the

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proceeding adverse to the bankrupt, each creditor was at liberty to act for himself, and could withdraw his proceeding, if he thought proper. When the bankrupt was the applicant, each creditor resisted for himself; and before he could oppose at all, it was necessary that he should prove his debt.

So far as the authorities adverted to, proceed on positive law, or on the supposed influence of signatures and names upon other creditors, it is evident they are not applicable in principle to the bankrupt act of 1841. The same thing may be said of all those cases which arose upon payments made, or securities given, out of the effects of the bankrupt or insolvent, obligatory upon him.

To apply these considerations to the case before us. The three judgment creditors had proved their demands, and opposed the discharge of Corse, with a prospect of ultimately defeating it. It seems probable there was no good cause for this opposition, but that is not material, as we regard the point. The testator, without the connivance or knowledge of Corse, and without any collusion on his part, arranged with the three creditors to give the testator's notes for a portion of their debts, on receiving an assignment of the judgments; the notes and assignments to be delivered by the depositary to the creditors whenever Corse should be discharged. The principal consideration for the notes, was the withdrawal of their opposition to his discharge. But how does this affect their validity?

If when the notes were signed by the testator, in December, 1845, he had, for the same considerations, actually delivered them to the creditors, and received the assignments, there would have been no good objection to a recovery upon the notes. The testator, as the owner of the judgments, could withdraw the opposition founded upon them, and the agreement of the creditors to withdraw their opposition when they had ceased to have a right to make any, would be altogether idle and unmeaning.

Are the notes any the less valid, because they were to be retained by the depositary until Corse was actually discharged? We have seen that the case is not within the principle of the insolvent act requiring two-thirds, and of the English bankrupt certificate.

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It is certain that the arrangement was not oppressive upon Corse, because he did not know of it, and was not to participate in it. It was no fraud upon his other creditors, for it is not shown that there was any other creditor who had ever put himself in a condition to oppose the discharge. If there were others who had proved their debts, and had stood back, relying upon these three creditors to fight the battle at their own expense, for the benefit of all the creditors; we do not perceive that such others had any right to insist on the continuance of the warfare, or would be entitled to any sympathy, if it were terminated without their concurrence.

There is no aspect of the arrangement, in which it was detrimental to the rights or interests of third persons. It legitimately affected no one, except the testator, who was satisfied with the consideration he received. As to its sufficiency, we will speak presently.

Although, on the first statement of the case, we were under the impression that the spirit of the adjudged cases was against the plaintiff, we are satisfied on an analysis of their principles, that there is no good reason for holding that the acceptance of the notes was contrary to the policy of the bankrupt act, or against public justice.

We have found no authority which holds that a note thus given, without the procurement, connivance, or knowledge of the bankrupt, and in no manner affecting his property, present or future, is void. On the contrary, there is a decision of a distinguished judge, which in principle, appears to sustain an obligation given under such circumstances. In *Winsor v. Kendall*, (3 Story R. 507,) it was decided, that a payment made by a friend of a bankrupt, in contemplation of bankruptcy, out of his own funds, or in such a manner that the creditor had a right to suppose he was paying out of his own funds, and not out of those of the bankrupt, was not a fraudulent preference, within the meaning of the bankrupt act.

In England, where the bankrupt acts have been far more stringent than either of those enacted by Congress, it has been held, that a creditor may sell his debt to a friend of a bankrupt debtor, upon the terms that the creditor should sue out a commission of bankruptcy against the debtor. (*Fry v. Malcolm*, 5

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Taunt. 117.) And we perceive no good reason, why under the act of 1841, a friend of the bankrupt might not buy the debt of an opposing creditor, so as to remove such opposition; provided the bankrupt himself was neither a party, or privy to the arrangement, and his effects were not to be made liable for the purchase.

It is made a point, that the notes were without consideration. The assignment of the judgments was a sufficient consideration. We have no means of knowing, either that they were wholly worthless, or what circumstances induced the testator to estimate them as valuable.

A new trial must be granted; the costs to abide the event of the suit.(a)

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(a) In *Fox v. Paine*, (10 Alabama Rep., New Series, 523,) it was held, that the fact that the bankrupt, or some one for him, paid money to a creditor, to induce him to withdraw his objections to the bankrupt's discharge, is not such a fraud as will render the certificate inoperative. The court considered the circumstance that under the English bankrupt acts, it was necessary that four-fifths, and afterwards three-fifths, of the creditors to consent in writing to the bankrupt's discharge, as being the ground of the decisions relied upon by the defendant's counsel, and as distinguishing the case before them from those decisions.



**JUSTICES**  
**OF THE**  
**NEW YORK SUPERIOR COURT,**

**DURING THE PERIOD EMBRACED IN THE RESIDUE OF THIS VOLUME; COMMENCING MAY 1ST, 1849.**

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<b>THOMAS J. OAKLEY, CH. J.,</b>	<b>JUSTICES.</b>
<b>AARON VANDERPOEL,*</b>	
<b>LEWIS H. SANDFORD,</b>	
<b>JOHN DUER,</b>	
<b>JOHN L. MASON,</b>	
<b>WILLIAM W. CAMPBELL,</b>	

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\* Judge VANDERPOEL was succeeded, January 1, 1850, by the Hon. ELIJAH PAINE.

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Brady v. The Supervisors of New York.

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**BRADY v. THE SUPERVISORS OF THE CITY AND COUNTY  
OF NEW YORK.**

A claim for services rendered as counsel for the board of supervisors of a county, and its various committees, is a *county charge*.

No action for the recovery of a county charge, can be maintained against a county, or the board of supervisors.

Suits against a county can be brought only for such causes of action or controversies, as cannot be settled and adjusted by the board of supervisors, in the exercise of their ordinary powers, such as torts, malfeasances of county officers, and the like.

The supervisors of a county, as such, or as a board, are not a body corporate, and possess no powers as a corporation. The corporation is the county.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, J. J.)

March 5, 6, 7 ; May 12, 1849.

MOTION to set aside report of referees. The action was brought by the plaintiff to recover compensation for professional services rendered to the defendants during the years 1845, 1846, and 1847, while the plaintiff was counsel to the corporation. The declaration contained a special count adapted to the case, and also the common counts for work and labor. The plea was the general issue. By an order of the court, the cause was referred, on the 31st day of March, 1848, to John L. Mason, Benjamin W. Bonney and Nelson Chase, counsellors at law.

Upon the trial before the referees, it appeared in evidence, that the plaintiff was the general legal adviser of the defendants, and had been so from May 1st, 1845, to May 1st, 1847, and that during that time, at the request of the defendants, he had attended various meetings of the board of supervisors; that questions of law, involving important principles, had frequently arisen, upon the decision of which large amounts depended; and that these various questions were referred to the plaintiff, who had given his opinions upon the same; and that the services thus rendered by the plaintiff, required much time and labor in their performance.

It was contended, on the part of the defence, that the action being in form against the county, could not be sustained; because the services, if any, were a county charge; that the

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Brady v. The Supervisors of New York.

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remedy in such cases, is pointed out by statute; that the claim must be presented to the board of supervisors, who are authorized and empowered to settle the same, and that, in the exercise of this power, they act as a judicial body. That if such an action could be sustained, there was no evidence of any resolution of the defendants employing the plaintiff as counsel; and that the mere fact of the plaintiff's attending meetings of the board, was not sufficient evidence of retainer. It was also contended, that admitting the fact of a retainer, the sum claimed by the plaintiff was not legally recoverable.

Various other points were made on the defence, which are not material to be reported.

The referees decided, that the action was maintainable, and that there was sufficient evidence of retainer, and reported in favor of the plaintiff for the sum of \$2475 00.

*J. T. Brady*, and *S. Sherwood*, for the plaintiff.

I. The plaintiff having, as a counsellor at law, rendered services to the defendants, on their employment, has a right to recover whatever is a reasonable compensation for those services, unless some legal impediment to such recovery exists.

II. There is no such legal impediment. At common law, the plaintiff would clearly have a right of action against the defendants; because any individual, who, at the request of another, renders him service of a lawful nature, can legally recover compensation in a court of justice.

That the defendants are supervisors would not, in reference to the common law right of the plaintiff, make any difference whatever.

They are a corporation, or *quasi* corporation, and, as such, can sue and be sued. This has been adjudged in relation to overseers of the poor, as well as supervisors. (*Todd & M'Cord v. Birdsall*, 1 Cowen, 260; *Olney v. Wickes*, 18 J. R. 122; *King v. Butler*, 15 J. R. 281.)

They have the same right as a natural person to employ counsel, and are under the same obligation to pay him. The right to sue in such a case as this, has never before been questioned.

There is nothing in any statute which can deprive the plain-

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Brady v. The Supervisors of New York.

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tiff of his common law right of action against the defendants. Every county in this state is declared by statute to be a corporation, but only capable of exercising its corporate powers by the board of supervisors. (1 R. S. 365, secs. 2, 3.) This removes all doubt as to the capacity of defendants to sue and be sued. Express authority to bring suits against counties, by impleading the supervisors as defendants, is given in 2 R. S. 473, sec. 95.

The provision (1 R. S. 386, sec. 4,) requiring that "Accounts for county charges of every description shall be presented to the board of supervisors of the county to be audited by them," is not an obligation imposed on those having claims against counties, but a mere legislative direction as to the proper authority to which those having such claims may present them. Construed in its exact language, it would make the presentation of such claims compulsory, even if the holders thought proper to abandon them. The words "shall or may," when used in a statute, are only imperative when public interests and rights are concerned; but when a statute declares that an individual or individuals shall or may do certain acts, or have a certain remedy, which is intended for his or their own benefit, he or they have a discretion to do the act or pursue the remedy, or not. (*Malcom v. Rogers*, 5 Cow. 188.)

The statute *in pari materia* relating to "legal proceedings in favor of and against counties," (1 R. S. 384, sec. 1,) shows the correctness of the position above taken. It provides, that where any "cause of action" exists between a county and an individual, the like proceedings may be had, and the same judgment, as in other suits or proceedings of a similar kind between individuals and corporation. This statute regulates the proceedings in such suits, and provides (sec. 6) for the recovery of costs, but does not make it conditional to a party's rights that he shall first present his claim to be audited. In the case of district attornies, where fees and expenses are made a county charge, there is a specific provision of the statute requiring him to give the supervisors notice of the taxation of his costs. (2 R. S. 752, sec. 9.) But there is no section of any statute requiring a private citizen who has a lawful demand

against the county or supervisors, to postpone his action for such demand until they have acted upon it.

The plaintiff had no remedy by mandamus. The supreme court have distinctly settled, in several cases, that where the supervisors omit to pay or to audit, a party has a complete remedy by action, and that for this very reason, no mandamus will be allowed. (*Ex parte Lynch*, 2 Hill, 45 ; *People v. Lawrence*, 6 Hill, 244 ; *Ex parte Firemens' Ins. Co.*, 6 Hill, 243.) The writ of mandamus has, by all the later decisions of our supreme court, and court for the correction of errors, been restricted to what is supposed to be its only legitimate office, viz. : to compel an inferior tribunal to act where action is a legal duty, but not to direct such action. It is perfectly clear that no mandamus could compel the supervisors, either to allow the claim of the plaintiff in this suit if they thought proper arbitrarily to reject it, putting him to his action ; nor could the supervisors be compelled to allow the plaintiff any particular amount. Even if it should be held, that in order to have an account against a county audited, a party should, or might, present it to the supervisors, and even if the party, on their failure or refusal to audit, could obtain a mandamus, yet the party's common law right of action would not be impaired, because it is perfectly well settled, that "If a statute give a remedy in the affirmative, (without a negative, express or implied,) for a matter which was actionable at the common law, the party may still sue at common law, as well as upon the statute ; for this does not take away the common law remedy." (*Almy v. Harris*, 5 J. R. 175 ; *Farmer's Turnpike Co. v. Coventry*, 10 J. R. 389 ; *Crittenden v. Wilson*, 5 Cow. 165 ; *Troy Turnpike Co. v. McChesney*, 21 Wend. 296.)

The case in 5th Cowen, will be found very strong to this point.

III. The defence attempted, that the plaintiff rendered the services in question as counsel to the corporation, and without any intention to charge the defendants, is without foundation, or even pretext, in fact or in law.

The defendants are a corporation, as already shown, by statute, representing the county of New York, and composed of the mayor, recorder and aldermen of the city of New York.

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As a corporation, the defendants may possess property, and exercise various powers enumerated in the revised statutes. (1 R. S. 364, sec. 1.)

The corporation of the city of New York, entitled "The Mayor, Aldermen and Commonalty, of the city of New York," is a municipal corporation, created by charter, with additional powers conferred by statute, and with jurisdiction over the city of New York for municipal purposes. To the county corporation the recorder belongs, but not the commonalty. In reference to the city corporation, the converse is the case. The financial officer of the defendants is the county treasurer, and the reason why the chamberlain executes the duties of that office, is that the statute makes him treasurer. (1 R. S. 367, sec. 17; Ibid. 370, sec. 29.) The comptroller of the city of New York is a charter officer belonging to the city corporation, without any power over the property or finances of the county, except where it is expressly conferred on him by statute.

From the preceding detail of the various characteristics of the city and county organizations, it is apparent that neither of them is under any obligation, or has any right to furnish the other with a lawyer, any more than the corporation of this city could perform this kindness for the county of Kings. The plaintiff never agreed with the corporation of the city of New York, that in consideration of a compensation to be paid by them, he would render any legal services to the board of supervisors; and any such agreement, if any made, would be as void as absurd, there being no consideration to support it any more than if a policeman, in consideration of his salary, should agree to perform duty in New Orleans for the benefit of the latter city.

*F. B. Cutting*, for the defendants.

I. The county of New York is a *quasi* corporation, created for the purpose of government, with special powers. It has power to sue and be sued in the name of the supervisors, who are the officers for the time being of the corporation. (1 R. S. 356, 364, 384, 385, 416; 2 R. S. 569, sec. 94; 26 Wend. 69; *Ward v. Co. of Hartford*, 12 Conn. Rep. 404; Kent's City Charter, 209; 6 Hill, 244.)

II. The supervisors are also a *quasi* corporation, created for special purposes, and with special powers. But they have no corporate capacity for their own benefit. All their corporate powers are in trust, to be exercised for the use and benefit of the county. They may, in some cases, sue and be sued, but the action must be brought by and against them individually, specifying in the process, pleadings, and proceedings, their name of office; and if their name be not mentioned, it is a ground of nonsuit at the trial. (2 R. S. 569, sec. 92, 94, 96, 99, 106, 111; *Supervisors, &c. v. Stinson*, 4 Hill's Rep. 136; *Commissioners &c. v. Peck*, 5 Hill, 215; *Jackson v. Hartwell*, 8 Johns. Rep. 422; *Jansen v. Supervisors of Kingston*, 1 Cowen's Rep. 670; *Grant v. Francher*, 5 Cowen's Rep. 309; 1 Cowen's Rep. 260, note a.)

III. This action is not, therefore, in form, against the supervisors, and cannot be maintained against them; but being in form against the county, it must be considered as a suit against the county, and as such, it cannot be sustained; for

(1.) The services rendered by the plaintiff, if any, for which this action is brought, are a county charge, having been rendered (as alleged) for the use and benefit of the county; and although a county may sue and be sued, yet it cannot be sued for any account or claim which is a county charge, and which it is the duty of the board of supervisors "to examine, settle, and allow." The remedy in such cases is pointed out by statute. The claim must be presented to the board of supervisors, with a just and true statement in writing of the nature of the services performed, and of "the time actually and reasonably devoted to the performance of such services," to be audited, settled, and allowed by them. (1 R. S. 439, sec. 1, 2, 3, and 4; 1 R. S. 418, sec. 4, sub. 2; see also cases cited under next point below.)

(2.) The supervisors, as officers of the county, are clothed with judicial authority to "examine, settle, and allow all amounts chargeable against the county," and "to administer oaths to any person presenting an account or claim to be audited," and concerning any matter submitted to the board. (1 R. S. 418, sec. 4, sub. 2; 1 R. S. 420, sec. 8; Laws of 1836, chap. 506, sec. 3; Laws of 1845, chap. 180, sec. 22; *Supervisors of Albany*, 12 J. R. 414; *Supervisors of Dutchess*, 9 Wend. 508;

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*Supervisors of New York*, 1 Hill, 362; *Merrit v. Lawrence*, 6 Hill, 244; *Ex parte Lynch*, 2 Hill, 45; *Supervisors of Warren*, 1 Howard Sp. Term Rep. 116.)

(3.) In giving judicial powers to the board of supervisors "to examine, settle, and allow" all claims for county charges, the legislature intended to protect the county against the exorbitant claims and the innumerable suits that might, and no doubt would otherwise be brought against the county, nor is there any injustice in this, since all persons performing services for the use and benefit of a county, must be presumed to know and assent to the mode pointed out by the statute for the collection of their claims.

(4.) The uniform practice, in cases like the present, has been to proceed by mandamus; and a mandamus will not lie where there is a legal remedy. (10 Wend. 363.)

IV. But should it be considered that a suit can be maintained to recover claims for county charges, still the plaintiff is not entitled to recover in this suit.

(1.) The testimony shows affirmatively that the board never adopted any resolution to employ the plaintiff as counsel, and there is no evidence that they ever adopted any resolution authorizing any individual or committee thereof to employ him. The statute no where gives power to a member, or a committee of the board, to contract liabilities and charges against the county, for the professional services of a lawyer. (1 R. S. 364, sec. 1, 2, 3, 4; compare with Statutes relating to Towns, 1 R. S. 357, &c.; *Conall v. Town of Guilford*, 1 Denio, 510; *Hotchkiss v. Le Roy*, 9 John. 142, as to evidence of retainer.)

(2.) If the committees, or any member thereof, consulted the plaintiff and requested him to give opinions and draw reports and resolutions, it was for their convenience and without the authority of the board. The plaintiff's claim for such services, if any he has, is against individual members of the committees, or persons employing him, and not against the county, nor against the board, who, for aught that appears, never knew that he was consulted or employed by such committees or persons. (19 Johns. Rep. 252.)

(3.) The mere fact that the plaintiff attended the meetings of the board, (if a contract could be implied, as in the case of in-



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dividuals,) is not sufficient evidence of employment to create an implied assumpsit; as the meetings of the board are public. (1 R. S. 420, sec. 6.) He may, if observed, have been considered a mere spectator. At all events it cannot be presumed from this, that the board knew that he was in their service at the time, so as to create an implied assumpsit to pay therefor.

(4.) Nor were the notices sent to him any evidence of employment; inasmuch as those notices were usually sent by order of the comptroller, who was not a member or any officer of the board; and when not sent by his direction, it was by the direction of the chairman of some committee; as they were delivered by the messenger without any direction on the subject. Such notices, therefore, were not authorized by the board and were not binding upon them; it no where appearing that the board ever directed him to be notified, or that they knew that he was so notified. Besides, the weight of evidence shows that when so notified, the notice was given to him as the counsel to the corporation of the city, and not otherwise.

(5.) There is no evidence of any retainer in the case of Lynch and Parish. The statute requires that when a suit is commenced against the supervisors, a statement thereof shall be laid before the board for their direction. (1 R. S. 439, sec. 3.) There is no evidence that this was done in these cases, nor in the cases of taxation of costs. All the evidence then, of a retainer, which has been offered, is the mere fact that the plaintiff appeared in those suits and proceedings on behalf of the board; that is not sufficient; especially when the evidence on the part of the defendants goes to show that he had charged these very services to the corporation of the city of New York, whose counsel he was at the time, and who were as much interested in the subject matter in which his services were rendered as the county. (*Hotchkiss v. Le Roy*, 9 Johns. Rep. 142.)

V. But even if the evidence were sufficient to establish the fact that the plaintiff was employed, still, it also shows that he was employed by a branch of the common council, and as the counsel of the common council, upon matters connected with and directly concerning the business of the city corporation; and it was his duty as such counsel to render those services for the salary and other compensation which was paid to

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him by the corporation, through the board of supervisors ; and he has no right to make an extra charge for such services. They were all included within his contract with the corporation. He has, therefore, been fully paid the claim which he seeks to recover in this cause. (Rev. Ord. 1838-9, p. 13, &c. ; *Phoenix v. Supervisors of New York*, 1 Hill, 362.)

VI. The evidence of Mr. Blunt as to the value of the services of the plaintiff, from hearing the evidence read, was incompetent, and should be excluded, and also all those parts of the evidence which refer to the contents of resolutions of the board or of its committees.

**BY THE COURT. OAKLEY, CH. J.**—The defence relied upon, is two fold :

*First.* It is insisted that the services of the plaintiff, for which the action is brought, were rendered by him in his character as counsel of the corporation, appointed by the common council of the city of New York.

The written opinions and reports prepared by the plaintiff and exhibited on the trial, appear to have been signed by him with the official addition of "counsel to the corporation;" and it is claimed by the defendants, that the supervisors of the city and county of New York, are in fact and in substance, the same as the corporation of the city of New York ; as they govern the same territory and the same people, and represent identically the same interests ; and that the salary of the plaintiff, as counsel of the corporation of the city, ought to be held to cover his services in this respect.

We have not much considered this point, and in the view we have taken of the case, it is not necessary for us to decide it.

Assuming that the plaintiff stands towards the board of supervisors, in the same attitude that any other professional gentleman would, who had performed the same services, and that he is entitled to recover, if any person could recover ; the next ground of defence is, that for services of this character, no action at all can be sustained against the supervisors of the county, or rather against the county.

The plaintiff, from the points submitted, appears to have en-

tertaind the idea, that the supervisors, or the board of supervisors, are a body independent of the county which they represent; and as such may incur liabilities, and be subject to suits, as a board or corporate body.

This we deem erroneous. The supervisors as such, or as a board, are no body corporate, and possess no powers as a corporation. The corporation is the county.

The revised statutes, (1 R. S. 364,) under the head "Of the Powers, Duties and Privileges of Counties, and of certain County Officers," proceed to erect a system, regulating this whole subject.

The first section of title first, declares that each county, as a body corporate, has capacity :

1. "To sue and be sued in the manner prescribed by law.
2. To purchase and hold lands within its own limits, and for the use of its inhabitants, subject to the power of the legislature over such limits.
3. To *make such contracts*, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers; and
4. To make such orders for the disposition, regulation, or use of its corporate property, as may be deemed conducive to the interests of its inhabitants."

The second section enacts that no county shall possess or exercise any corporate powers except such as are enumerated in that statute, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given.

The third section is as follows: "All acts and proceedings by or against a county in its corporate capacity, shall be in the name of the board of supervisors of such county; but every conveyance of lands within the limits of such county, made in any manner, for the use or benefit of its inhabitants, shall have the same effect as if made to the board of supervisors."

And section four provides, that the powers of a county as a body politic, can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted.

Looking at these provisions of the revised statutes, it will be perceived that every county is a corporation with defined and

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restricted powers, to be exercised in a particular manner, viz.: by the board of supervisors itself, or by some person in pursuance of a resolution by them adopted. There is no grant of corporate power, to be used by or in behalf of a county, in any other mode.

In the city and county of New York, the aldermen of the city, together with the mayor and recorder, constitute the board of supervisors, which exercises the powers conferred by this chapter of the revised statutes.

Proceeding with its provisions, the fourth section of title second gives to the board of supervisors of every county, at their annual meetings, or at any other meeting, power, "To examine, settle, and allow all accounts chargeable against such county; and to direct the raising of such sums as may be necessary to defray the same;" (Subd. 2.) "To audit the accounts of town officers," &c.; (Subd. 3.) By the eighth section, the chairman of the board, is clothed with power to administer an oath to any person, concerning any matter submitted to the board, or connected with their powers or duties.

Each board is entitled to have a clerk who is to record all the proceedings of the board; and it is made one of his duties, to make regular entries of all the resolutions and decisions of the board, on all questions concerning the raising or payment of moneys. He is also to preserve and file all accounts acted upon by the board. (§ 9.) The books and records of the boards of supervisors are open to public examination, without charge. (§ 11.) The third title of the same chapter of the revised statutes, (1 R. S. 384,) is entitled, "Of legal proceedings in favor of and against counties." The first section provides, that if any controversy or cause of action shall exist between the counties, or between a county and an individual, such proceedings shall be had, at law or in equity, for trying and finally settling the same, in like manner, and with like effect, as in similar suits or proceedings between individuals and corporations. By the second section the county, in all such suits and proceedings, shall sue or be sued in the name of the board of supervisors thereof, except where county officers are, by law, to sue in their name of office, for the benefit of the county. When a suit is commenced against a county, the chairman or clerk of the board, must lay

before the board of supervisors, a full statement of the suit, for their direction in regard to its defence. (§ 3.) The sixth section provides for the recovery of costs, and that judgments recovered against counties, or against county officers in their name of office, shall be a county charge, and when levied and collected, shall be paid to the person to whom the same shall have been adjudged.

These provisions as to suits, are further carried out in the subsequent chapter of the revised statutes, entitled, "Of proceedings in special cases," in the title, "Of proceedings by and against corporations, and public bodies, having certain corporate powers, and by and against officers representing them." (2 R. S. 444, 457, 473.) Section ninety-two of title four permits actions to be brought "by the supervisors of a county;" but actions against counties, when allowed by law, are to be brought against the board of supervisors thereof. (§ 95.) Such actions as are allowed against the officers enumerated in section 92, must be brought against them individually, specifying their name of office; (§ 96;) and it is therefore inapplicable to suits against a board of supervisors, or the supervisors of a county, as such. It is further enacted, in the same article and title, that no execution shall issue on judgments recovered against the board of supervisors, and it prescribes the manner of obtaining payment of such judgments, by laying the same before the board of supervisors, to be by them added to the tax to be laid on the county. (§ 102, 103, 107.)

It will be observed that by these various provisions of law the board of supervisors is clothed with ample power, to examine, settle, and allow all accounts, chargeable to the county; or in other words, which may be county charges. And the county may be sued for certain claims, or in respect of certain causes of action or controversies, as expressed in the third title before cited. (1 R. S. 384.)

It is claimed by the plaintiff, that the first section of this title, enables individuals to bring suits against a county, for any claim, cause of action or controversy whatever; although the same may be an account, which might be allowed as a county charge.

We consider that a different construction must be given to

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the third title; and that it was intended to provide a remedy against the county, for such causes of action, (and no other,) as could not be presented to and examined and allowed by the board of supervisors as county charges. Of this class, would be claims for the malfeasances of county officers; and claims arising from torts, for which the county may be liable.

“Such controversy,” in the first section of that title, means as we think, such a claim or cause of action as cannot be settled and adjusted, on the application of the party, in the exercise of the ordinary powers of the board of supervisors, and which is not a county charge until it passes into judgment.

The inquiry is, whether in cases (like the plaintiff's,) an action can be brought at all, against the board of supervisors. Here no account has been presented to the board, for audit and allowance. The suit rests on the distinct claim, that every one who has a demand against a county, on an implied contract, may sue the county for its recovery; and that any one who has submitted such a demand to the board of supervisors, for their examination and allowance, may abandon his pursuit there, and commence a suit against the board as representing the county.

The maintenance of this claim will necessarily lead to interminable suits against the counties, for every description of accounts and demands. We think it was clearly the intention of the legislature, to protect counties from such suits. The board of supervisors, as organized by law, consists of a body of men, elected by the people to represent their respective towns and wards. They have no interest against claimants, nor any feeling on the subject, other than that of every judge and every citizen. The statute virtually makes this body, a board of arbitration; to which all parties, having claims against their respective counties, other than those of the indefinite character before referred to, must submit such claims for examination, audit and allowance; and it allows no appeal from their decision. They are a judicial body, constituted by law to decide on all matters of account between individuals and the public body composing the county which they represent.

If, in this case, the plaintiff had contracted specially with the

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board of supervisors, to receive such compensation for his services as they might allow, the arrangement would have been binding upon him. As the law prescribing the mode of ascertaining claims of the like character exists, we consider the services of the plaintiff as having been rendered under the law; and that the law, in effect, is incorporated into the contract. The plaintiff must be presumed to know the law, and to have contracted in reference to it.

It is not to be doubted that the plaintiff's claims are county charges, and might have been submitted to the board of supervisors for allowance. He claims by force of an implied contract of the board, for services which were beneficial to the board, and thus to the county.

The supreme court had the statutes on this subject under consideration in *Bright v. Supervisors of Chenango*, (18 Johns. 242; *Mallory v. Supervisors of Cortland*, and *Doubleday v. Supervisors of Broome*, (2 Cow. 583;) and *The People v. Supervisors of Albany*, (12 Wen. 257.)

Those cases establish this general principle, that wherever services have been rendered, which are beneficial to a county, and no specific compensation is provided for the same by law, they shall be deemed contingent charges against the county.

The services of the plaintiff are precisely of that character.

It will be seen by reference to the statute regulating the powers of county officers, (1 R. S. 385, § 3,) that after specifying various liabilities and demands, which shall be deemed county charges, the fifteenth subdivision includes "The contingent expenses necessarily incurred for the use and benefit of the county." These are to be examined, settled and allowed, by the board of supervisors; and the fourth section of the same title, contains the general direction before mentioned, that accounts for county charges of every description shall be presented to the board to be audited by them.

It is said the statute is directory only, and if the plaintiff's claim fall within the description of a county charge, it was optional with him to submit it or not, to the board of supervisors.

We cannot give such a construction to the statute. The



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fourth section is peremptory in its terms, that all accounts for county charges shall be submitted to the board ; and it is an essential part of the whole system, framed with the intention that no action at all should be brought against a county for such services.

There is no hardship in the provision of the statute thus construed. The services in this case were rendered voluntarily, as the plaintiff might have declined to render them, if he did not approve of the mode of compensation provided by law.

We find no adjudged case, where it has been held that an action may be sustained against the supervisors of a county, for such claims. There are many cases reported, in which writs of mandamus have been issued to boards of supervisors. There is none of those, where the amount to be audited was not fixed by statute, or where the amount claimed was not admitted ; and where the sole question was, whether the claim presented to the board was a county charge ; and in those cases, the supreme court has ordered the supervisors to proceed and audit the claim.

The plaintiff refers us to the case of *Ex parte Lynch*, (2 Hill, 45.)

There the supreme court refused to issue a mandamus, to the supervisors of the city and county, because the relator had an action against the corporation of the city of New York, inasmuch as the statute directed the corporation to pay him a specified salary. It was not intimated that he could maintain a suit against the county, or the board of supervisors. And where that court has granted the writ of mandamus, it has been because there was no remedy by action. (*The People v. Supervisors of Columbia*, 10 Wen. 363.)

We find no case in the books, where the idea is presented, of bringing an action against a county, or against a board of supervisors, for such a claim as the plaintiff's ; or where it appears to have been thought of before.

This disposes of the case before us, and it is perhaps not necessary that we should notice another view of the matter, which is urged by the defendants ; that the board of supervisors, by their acts, can charge their county only in the mode



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prescribed by the statute. That here the action on which the plaintiff's claim is based, was wholly informal and ineffectual; the board as a body, never having acted at all, or adopted any resolution on the subject, and never having authorized any committee to engage the professional services of the plaintiff.

It may well be questioned, whether their action as a board, or of their committees, as proved in this case, could charge the county as a body politic. But we need not decide the point.

The plaintiff must fail, on the ground that his claim is a county charge, for which no action can be sustained against the board of supervisors. The report of the referees must be set aside, with costs to abide the event of the suit; and the rule directing a reference will be discharged. The parties can readily turn the special report of the referees into a bill of exceptions, as upon a trial at nisi prius, and a non-suit there ordered, if they choose to do so, with a view to ulterior proceedings.

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## POST v. THE SAME.

Where the owners of city lots which had been sold for the non-payment of void assessments, redeemed the same by paying to the street commissioner the amounts for which the lots were sold, with interest and costs; *Held*, that the payments being voluntary, and not made under a mistake of fact, or of law, could not be recovered back, in an action against the city.

The muniments of title, upon an assessment sale, consist of several proceedings, all of which are indispensable to its validity; and if one be wanting, no title is conferred.

In the absence of either of the proceedings forming an essential part of the record of an assessment title, such title is void on its face.

A void assessment constitutes no cloud upon the title; and the payment of such an assessment, by the owner of the property, cannot be considered compulsory.

The cases respecting duress of personal property, in which it has been held that payments made for its relief are involuntary, and may be recovered back, are inapplicable to real estate.

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Where a party, without any legal compulsion or duress of goods, yields to the assertion of an adverse claim, by paying the amount, he cannot detract from the force of his concession, by protesting against the legality of the claim. In such a case the payment nullifies the protest.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, J. J.)

March 6, 9, 12 ; May 12, 1849.

MOTIONS to set aside report of referee. The first of these causes was an action of assumpsit, brought to recover the sum of \$2527 22, paid by Fleetwood, the plaintiff, to the defendants, Feb. 27, 1845, to redeem several lots of ground belonging to him, from a sale thereof, made by the defendants on the 13th of June, 1843, under an alleged assessment for *filling the lots*.

The cause was referred to William Mitchell, Esq.

Upon the trial before the referee, it appeared in evidence that the plaintiff had paid the amount for which this action was instituted to the street commissioner, accompanying the payments, by a protest against the legality of the assessment. It also appeared that the plaintiff was the owner of the lots in question, and became such in January, 1845, and that at the time of his purchase, nothing was said, or known by him in reference to any assessment having been made.

It also appeared, by the testimony of the clerk of the common council, that he had searched in his office for an ordinance to fill in the lots in question said to have been passed in December, 1834, but that none could be found ; that he had searched the original papers themselves, and could not discover any such ordinance.

The redemption clerk in the street commissioners office, at the time of the alleged passage of the ordinance in question, testified that it was his duty to take charge of redemptions for assessment, and to preserve the evidence of liens ; that he had made diligent search, and could discover no papers in reference to this assessment, or the sales of the lots in question for such assessment. That the street commissioner's office was the place where all original assessments were desposited.

It also appeared that at the time of the payment of the assessment in question, the plaintiff was negotiating for a loan by mortgage upon the premises, but the payment of the assessment

was required as a condition precedent, it being regarded as a cloud upon the title.

It appeared in evidence, on the part of the defendants, that in the case of filling lots, the course of procedure was, for the city inspector to make out an ordinance which was submitted to the common council and the mayor, for approval. This was termed a *common ordinance*. After approval, the next step was to notify the owner or occupant of the premises, of the passage of the ordinance, giving them a definite time to perform. In case of their failure, a *special ordinance* was then passed, which recited, that for the more speedy execution of the work, it should be done by the common council. The city inspector would then advertise for proposals, and the contract was given to the lowest bidder. The surveyor made actual measurement of the filling of each lot, and returned a statement of the amount.

John Sickles, city inspector from 1835 to 1837, testified that these ordinances were never entered, unless endorsed with the approval of the mayor.

The defendants' counsel produced in evidence two books entitled, "*Ordinances for lot 6,*" and "*Special ordinances for lots, vol. 1,*" from the office of the city inspector, and offered to read out of the same ordinance 463 of common ordinances, and 528 of special ordinances. The same were read, subject to objection. These ordinances related to the lots in question, and covered the whole ground, but merely had the name of "J. Morton, Clerk," printed at the foot of them, and did not appear to have been approved by the mayor.

Mr. Forbes, who was city inspector at the time of the filling of the lots in question, testified that the course already detailed, was pursued in reference to the lots of the plaintiff, and that he never proceeded to fill in lots without first having the ordinance. That it was not always customary for the mayor to sign each separate ordinance; but as was frequently the case, where there were several in a package, he would only sign the first one.

The assessment list for filling the lots in question was also produced in evidence. The city surveyor testified to having surveyed the filling of the lots, and having made out the amount

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from which the apportionment was made, which was handed to the comptroller. Other testimony was introduced, which it is not material to set forth ; it being sufficiently referred to in the opinion of the court.

The referee reported in favor of the plaintiff, \$3172.

The record of these causes, in which Post was the plaintiff, was a similar action to the other, and the facts were the same, except as otherwise mentioned in the opinion of the court. The referee reported in favor of Post for the amount paid by him to redeem his lots, with interest.

*J. G. Ferguson and E. Sandford*, for Fleetwood.

*R. Mott and D. P. Hall*, for Post.

*Willis Hall and A. J. Willard*, for the defendants.

BY THE COURT. SANDFORD, J.—The referee has decided in these cases, that when the money was paid by the respective plaintiffs to the street commissioner, the corporation was not legally entitled to receive it. There were several distinct grounds upon which this conclusion was insisted by the plaintiffs. One of these, the want of any corporate ordinance, directing the lots to be filled, was a question of fact purely, and if found in favor of the plaintiffs, of itself sufficed to show that the assessments were void. As the referee may have reposed his decision on this point, and there was evidence in its support, we are not inclined to disturb the report on this ground ; although there is a wide difference between proving the existence of an ordinance affirmatively in order to establish and enforce a legal claim founded upon it, and proving that there never was any ordinance, in an action to recover money paid on the assumption that one existed. Evidence tending to show that there was an ordinance, may be sufficient for a defence in the action for money paid, which would be totally inadequate to establish a title founded upon an assessment sale made by virtue of such ordinance.

The important question remains, can the plaintiffs recover

back the money paid? The payments were not made under any mistake of fact. The plaintiffs declared and insisted that the assessments and the sales were void; and the referee has adjudged that they were void. There was no mistake of law even; for the plaintiffs knew perfectly well that a sale under a void assessment conferred no title upon the purchaser.

It is contended, however, that the payments were involuntary, and were made by compulsion. That the sales constituted a cloud upon the title, which cloud, circumstances compelled the plaintiffs to remove; and it is intimated by the points made in Mr. Post's case, that his payment was made through coercion, oppression, imposition, fraud, or by taking undue advantage of his situation, or by wrongfully exacting it, *colore officii*.

1. In regard to the cloud upon the title. The muniments of title, upon an assessment sale, consist of several proceedings, all of which are indispensable to its validity, and if one be wanting, no title is shown. Of these links in the chain, the plaintiffs insist that three at least never existed, viz.: the original ordinance directing the filling, the assessment of the expense, and the advertisement for redemption. Each of these proceedings forms an essential part of the record of the assessment title, and in their absence, such title is void upon its face. See the observations of the chancellor, in *Wiggin v. The Mayor, &c., of New York*, (9 Paige, 16,) and *Van Doren v. The Same Defendants*, (Id. 388.) A conveyance or judgment, void upon its face, does not constitute a cloud upon the title; and the assertion of a title under such a conveyance, or of a lien by virtue of such a judgment, does not afford a ground for equitable interference; much less does it constitute legal compulsion. There are cases of duress of personal property, in which payments for its relief, are deemed involuntary, and the money may be recovered back. Most of these have arisen upon seizures of goods under revenue or excise laws, and by public officers acting under process or warrant of law. The principle has been extended, occasionally, to cases where bailees, or others, who came into the possession of goods lawfully, have exacted more than was due, before they would relinquish such possession. It is founded upon the movable and perishable character of the prop-

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erty, and the uncertainty of a personal remedy against the wrongdoer. The reasons for the rule are wholly inapplicable to real estate, and we are not aware of any instance in which it has been applied to that species of property. On this subject of payments compelled by duress of property, we refer to *Chase v. Dwinall*, (7 Greenl. 134 ;) *Ellicott v. Swartwout*, (10 Peters, 137 ;) and *Clinton v. Strong*, (9 John. 370.)

It cannot be said therefore, that the payments in question were made through compulsion, coercion or oppression. There is no pretence that there was any imposition or fraud in the case. There was no advantage taken of the situation of the parties, nor was the money in any sense exacted from them. The corporation, whose agent, the street commissioner, received the money, was not only passive in respect of the payment, but so far as the case discloses, had no interest in the matter. The money, if the lots were redeemed, belonged to the purchasers; no part of it was to be retained by the corporation, and it was to the latter totally indifferent whether the redemption should be made or omitted.

The simple truth of the affair is this. The corporate authorities had sold these lots for assessments which they and the purchasers alleged to be valid in fact and in law. The original owners were entitled to redeem, on paying the bids with interest to the purchasers, through the street commissioner. Those owners averred and insisted that the assessments were absolutely void, both in fact and in law, and that the sales and conveyances were equally void. Thus the parties were at issue, each claiming a right, and the plaintiffs fully apprised of the grounds of the opposing claim. It became desirable for the one plaintiff to sell his lots, and for the other to mortgage his, and the assessment claims presented an obstacle to the accomplishment of their wishes. The plaintiffs, rather than to forego the opportunity of mortgaging and selling, chose to pay the assessments claimed; instead of abiding the result of a litigation testing their validity.

In our view, this clearly constituted a voluntary payment, which according to a well settled and valuable principle of law, cannot be recalled. (*Silliman v. Wing*, 7 Hill, 159; *Supervi-*

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sors of *Onondaga v. Briggs*, 2 Denio, 26, 39; *Brisbane v. Dacres*, 5 Taunt. 143; *Robinson v. City of Charleston*, 2 Richardson, 317. And see *Ege v. Koontz*, 3 Barr's Penn. R. 109.)

There is one fact in Mr. Post's case, which distinguishes it from Fleetwood's. Previous to his payment, the counsel of the corporation promised that his rights under a petition to the common council, should be reserved just as they then were; and both the corporation counsel and the street commissioner said, or assented to the proposition, that the plaintiff could pay the assessment, and reserve his rights against the corporation. These facts are not urged as showing any thing like fraud or imposition, because the officers named made no application to Mr. Post to pay the money, and they did not urge or request its payment, but it is claimed that they prove an agreement that the payment should not affect his rights.

As to the positive promise of the counsel, it relates apparently, to an application to the justice or clemency of the municipal legislature; and the assent of both officers to his being entitled to recover the money back, was rather the expression of an opinion on the law, than a stipulation.

But giving to the proof the broadest scope claimed for it, we do not perceive how it can alter the case. The corporation counsel had nothing to do with the subject matter. He could not receive the money or cancel the sale. As to the street commissioner, it was his duty by law to receive the redemption money, if tendered, for the benefit of the purchaser. He was a public officer, and the plaintiff was bound to know the extent of his authority. There is no proof that he was authorized to bind the corporation by such agreement as is inferred from the evidence; and there is certainly no such authority conferred upon him by law. If the plaintiff chose to redeem on the faith of such a promise, it gives him no rights against the corporation of the city.

The legal effect of the payment is not impaired by the protests made. When a party pays under duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right

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enforced by the adverse party. But where there is no legal compulsion, a party yielding to the assertion of an adverse claim, cannot detract from the force of his concession, by saying, I object or I protest, at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim.

The report of the referee must be set aside in each case, and the rules referring the causes are discharged.

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Where the expense of repairing a vessel injured by perils of the sea, will exceed a moiety of her value, the owners have a right to abandon her to the underwriters, and to recover for a total loss.

The assured has the right to make full repairs at the port of necessity, if they can be made there; and the expense of such repairs, at that port, furnishes the criterion for determining whether the loss be partial or total.

The assured is under no obligation to make partial repairs, so as to bring the vessel to a port where she can be completely refitted at less expense.

The condition of a vessel, at the time of the abandonment, is the test of the right to abandon.

As the capacity of a vessel to pursue her voyage is the ground of an abandonment, so the act of repairing, which is to divest the right to abandon, must be performed with the intent to make the vessel seaworthy, so that she may prosecute her voyage.

An abandonment, when effectually made, relates back to the time of the loss.

Partial repairs, made by the master in good faith, at the port of distress, in order to sail his vessel to another port for full repairs at a less expense, and not for the purpose of restoring the vessel and continuing the voyage, are to be deemed acts done in preserving the property insured, which do not impair the owner's right to abandon.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, J. J.)

March 13; May 12, 1849.

THIS was an action of assumpsit upon a policy of insurance for \$6000, on the barque Childe Harold, tried in June, 1848. The policy of insurance bore date November 18, 1845, and was



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for twelve months, upon a voyage from New York to a port or ports in the Pacific ocean not north of Guayaquil, from thence to any part of the world which the owners or their agents might direct. If absent, with liberty to extend the time to cover the risk, if necessary, at a port in the United States. The policy contained a stipulation authorizing the vessel, in her voyage, to proceed and sail to, and touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to the insurance. And it was declared lawful for the insured, in case of loss or misfortune, to sue, labor, and travel, for, in, and about the defence, safeguard and recovery of the vessel or any part thereof, without prejudice to the insurance; to the charges whereof the assurers agreed to contribute, according to the rate and quantity of the sum insured. It was also agreed that the acts of the assured or insurers in recovering, saving, and preserving the property insured, in case of disaster, should not be considered a waiver or acceptance of an abandonment. The counsel for the plaintiffs read the preliminary proofs of loss, showing that the barque sailed from Guayaquil, bound to Havana, with a cargo of cocoa, &c.; that having reached Havana in safety, she commenced discharging and taking in cargo, and while so employed, she encountered a violent hurricane, on the 11th of October, 1846, from which she suffered so badly, that she was unable to proceed on her voyage without extensive repairs. A protest was made by the master of the barque before the United States consul, and the consul ordered a survey to be made. Surveyors were accordingly appointed to examine into the condition of the vessel, with instructions to take with them the estimates of her thorough repairs, and the estimates of such partial repairs as would put her in a seaworthy condition to make a voyage to New York for further repairs. The surveyors reported that to make full repairs would cost \$9900, which would amount to an abandonment of the barque, and she would have to be sold for the benefit of all concerned; but that partial repairs, sufficient to enable the vessel to proceed to New York, might be made for the sum of \$960; and they recommended that partial repairs only should be made, and that the captain should pro-

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ceed to New York with the vessel, to complete the repairs at that port. Partial repairs were accordingly made at Havana, to the amount of \$2170 03; the vessel proceeded to New York with a light cargo. On the 11th of November, 1846, in New York, the assured abandoned the vessel to the underwriters, on the ground that the estimates made in Havana, of the expenses of repairs, showed that the barque had sustained damage and injury to an extent beyond a moiety of her value. The vessel sailed from Havana on the 9th or 10th of November, 1846, for New York. After her arrival at New York, she was sold for \$8000, and then repaired by the purchaser. The expense of such repairs, deducting one third new for old, was less than half the value of the vessel. The master of the barque testified that there was no communication with the owners in New York, nor was there time for any, before the temporary repairs were put on. The jury found a verdict for the plaintiff, by consent, for \$7000 damages, subject to adjustment, and to the opinion of the court upon a case to be made, with liberty to either party to turn it into a bill of exceptions or special verdict.

There was a similar suit, between the same parties, upon a policy on the freight.

*F. B. Cutting*, for the plaintiffs.

I. The preliminary proofs of loss and interest were sufficient. If there be any defect in them, the defendants cannot, under the circumstances proved, take advantage of it.

II. The damage to the ship by the hurricane of October, 1846, was so great, that she was incapable of being repaired at Havana, so as to prosecute her voyage to New York, except at a cost exceeding her value as fixed in the policy. Clearly it would have exceeded a moiety.

III. The assured had the right to repair the vessel at Havana, and to continue the voyage. He was not obliged to relinquish the great purpose of his enterprize, viz., carrying a full cargo; and to put on temporary repairs, and, in a crippled state, to proceed in ballast trim to New York, because the repairs could be obtained there at a cheaper rate. (*Center v. American*

*Ins. Co.*, 7 Cow. 564; *American Ins. Co. v. Center*, 4 Wend. 45.)

IV. The abandonment, on the 11th November, 1846, was made without delay, upon the receipt of intelligence of the disaster. The title to the vessel was thereby transferred to the underwriters from the time of the loss; and all subsequent events were at the risk of, and for the account of, the underwriters. (*Scheiffelin v. N. Y. Ins. Co.*, 9 Johns. R. 26; 2 Phill. Ins. 415; *The Brig Sarah Ann*, 2 Sum. 206, 210.)

V. The act of Joaquin Gomez and of the mate, (who, after the death of the captain, succeeded to the command,) in putting on temporary repairs, and undertaking to proceed to New York in ballast trim, did not take away from the assured the right to abandon. It was not an election by the assured, or their agents, to repair, followed by actual repairs and a resumption of the voyage, so as to deprive the plaintiffs of their right to recover for a total loss. (*Dickey v. American Ins. Co.*, 3 Wend. 658; 2 Phill. 406, 408; *Walden v. Phoenix Ins. Co.*, 5 Johns. 310; *Livingston v. Hastie*, 3 Johns. 293.)

At the time of the abandonment, the vessel was not repaired, or attempted to be repaired. (*Abbot v. Broome*, 1 Caines' R. 292.)

VI. The temporary repairs in Havana, and proceeding to New York, were acts intended for the benefit of the underwriters and for their account. To treat them as prejudicing the rights of the assured, would be partially to forbid any interference with, or acts done to, the property, with the view of protecting it and of diminishing the loss.

VII. It was for the purpose of preventing such a result that the New York underwriters have lately introduced into their policies the following clause: "That the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of abandonment."

VIII. The plaintiffs are entitled to judgment for a total loss; viz., the sum subscribed to the policy; and also for the expenses incurred in Havana for temporary repairs, wages, &c. (*Potter v. Prov. Wash. Ins. Co.*, 4 Mason, 300; 2 Phill. 464.)

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. *H. Ketchum*, for the defendants.

I. The offer to abandon bore date November 11, 1846. At that time the barque was on her return voyage from Havana to New York, her partial repairs having been completed November 2, 1846. The state of facts on the 11th November, determines the question of the right of the assured to abandon. (3 Kent's Com., last edition, 324 and 325, and authorities in note *a.*; *Dickey v. N. Y. Ins. Co.*, 4 Cowen, 222, 245, 246, 249; 2 Phill. 371 to 374; 3 Wend. 658, 664.)

II. The acting commander of the barque, acting as the agent of the owners, had elected to repair instead of to abandon, before the offer to abandon, and having so elected, the owners were bound by it, and could not therefore rightfully abandon. (*Dickey v. N. Y. Ins. Co.*, 4 Cowen, 246; 2 Phill. 442; *Carter v. Am. Ins. Co.*, 7 Cowen, 564.) "In general, the master cannot impair the right to abandon, by anything he does. The act of repairing is an exception." (7 Cowen, 582.) In *Humphrey v. Union Ins. Co.*, (3 Mason, 429,) the owner elected through his agent, the master, to make the necessary repairs and continue the voyage.

III. The right to abandon, if the assured were not deprived of that right by their election to repair, depends on the state of facts on 11th November. At that time the vessel was on her passage from Havana to New York, and the value of the repairs required to restore her, in the condition she then was in, did not amount to a moiety of her valuation in the policy.

IV. Even if the cost of temporary repairs may rightfully be added to the cost of repairs put upon the vessel after she was sold in her home port, it depends upon an adjustment to be made under the direction of the court, whether such repairs exceed a moiety of the appraised value of the vessel. In making such adjustment, the repairs valued must be restricted to those required to put the vessel in the condition she was in before the disaster, and not to any repairs required for a different trade or commercial employment.

BY THE COURT. SANDFORD, J.—There is no doubt that while the injured vessel remained at Havana, and before the partial repairs were made there, the plaintiffs were entitled to abandon, and to recover for a total loss. Full repairs might have been made in that port, and the expense of such repairs at the port of necessity, furnishes the criterion for determining whether the loss be partial or total. The plaintiffs were under no obligation to make temporary repairs, so as to bring the vessel to a port where she could be completely refitted at less expense. (*The American Insurance Company v. Center*, 4 Wen. 45.)

The defence rests upon the fact, that before the abandonment was actually made by the owners in New York, the barque had been so far repaired at Havana, as to enable her to proceed to New York with a light cargo, and had actually sailed from Havana a day or two before. The expense of the full repairs subsequently made in New York, after the proper deduction of one-third, added to the cost of the partial repairs at Havana, amounted, it is said, to less than half the valuation of the barque, and thus there was no constructive total loss. The defendants rely with great confidence on the case of *Dickey v. The American Insurance Company*, 3 Wen. 658; and a case of the same plaintiff against The New York Insurance Company, arising on a policy on the same vessel, reported in 4 Cow. 222. There the ship having met with disasters, was fully repaired at the port of necessity, at an expense exceeding three-fourths her value, and was proceeding on her voyage with such of her cargo as had not been sold, at the time the abandonment was made. It was held, that by fully repairing, the master as the agent of the assured, converted the total into a partial loss, before the date of the attempted abandonment, and that the owner could recover for a partial loss only.

The important difference between the case of *Dickey* and the one before us, is this. The voyage in that case, so far from being broken up, was actually consummated; and the ship when abandoned, was not only in good safety, but was doubtless a better ship than she was before the disaster. In this case, the voyage was lost; for the freight earned arose merely from

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putting on board sufficient weight to make a suitable ballast ; and so far from being in good safety when she was abandoned, she was totally unfit to carry a cargo ; and her subsequent repairs here, cost more than half her valuation.

The condition of the vessel at the time of the abandonment, is undoubtedly the test of the right to abandon. As the barque was situated, when the plaintiffs abandoned, within one or two days sail of Havana, there was still a total loss, unless the owners were bound to bring her to New York for repairs.

It is not claimed that they were so bound, unless the act of the master in putting the barque in a condition to come to New York for repairs, be deemed the act of the owners, and constituted an election to repair, instead of abandoning.

In point of fact, there is no reason for believing that there was any intention of the master to make full repairs. He was unquestionably acting for what he supposed was the best interest of all concerned. And it was the interest of the underwriters, whether the loss was partial or total, to have the barque repaired here, rather than at Havana.

Then was the master's act, an election on the part of the owners to repair the vessel ?

It is conceded that in general, the master cannot, by any thing he does, impair the right to abandon ; but it is said the act of repairing is considered an exception. This exception is sustained by the case of *Dickey*, before cited, and in this state may be said to be founded on that decision. As the incapacity of the vessel to pursue her voyage, is the ground of an abandonment ; so, in our judgment, the act of repairing, which is to divest the right to abandon, must be performed with the intent to make the vessel seaworthy, so that she may prosecute the voyage. Such were the repairs in the case of *Dickey*, which were held to defeat the subsequent abandonment. The vessel had been fully restored. The same circumstances existed in *Humphrey v. The Union Insurance Company*, (3 Mason, 429,) where the master's repairs were held to deprive the assured of the right to abandon.

It was conceded in *Dickey v. New York Insurance Company*, by the learned counsel for the underwriters, (now Mr. Justice

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Duer,) that in the case of a plain total loss, where the voyage was palpably gone, the master, before abandonment, acts for those concerned, and is so far the agent for the assurer. One principle reason why the master's election to repair takes away the right to abandon, is that the assurers are always entitled to determine for themselves whether they will repair the vessel or not.

This reason, it is apparent, does not apply to a case where mere partial repairs are made, not in order to prosecute the voyage, but to bring the vessel from a port of necessity to one where she may be fully repaired, at half the expense. Such repairs are purely of the nature of salvage, for the benefit of all concerned. Each case of this kind must be governed by its peculiar circumstances. No master would take the responsibility of such a course, unless there was a moral certainty that a substantial salvage would be effected by it; and his responsibility, with the requirement of good faith, seems to furnish a sufficient protection against wrong to the underwriter. (See *Milles v. Fletcher*, Dougl. 231.) In many cases, from necessity, the master is compelled to take various important steps for the preservation of the ship, or what remains of her after the disaster, and before he can communicate with either the owners or the assurers. In such cases, he is bound to act as he would if the property were his own; and if the loss be total, his acts in that intervening period are deemed those of the assurers. The abandonment, when effectually made, relates back to the time of the loss; (*Clarkson v. Phœnix Insurance Company*, 9 Johns. 1; *Waddell v. Columbian Insurance Company*, 10 Ibid. 61;) and it would be unreasonable to hold that partial repairs, made for the preservation of the property, are the act of the assured, and deprive them of the right to abandon.

The case of *Hall v. The Franklin Insurance Company*, (9 Pick. 466,) cited by the defendants, differs from the one at bar, in the essential fact, that the vessel insured was not so much injured that she could not be taken from Key West, the port of distress, to New Orleans, or even to Boston, without any repairs whatever. In fact, she sailed to Boston, and was there repaired. If the barque in question, had been in a condition to sail from



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Havana to New York, after the disaster, without being partially repaired, the case would have been parallel to that in 9th Pickering. It is not there decided that the owners are bound to make partial repairs at the port of distress, so as to take the vessel to another port where repairs can be made at less expense than they can be made at the former; the voyage in the meantime being broken up.

We have examined the case without reference to the clause in the policy, providing that the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered as a waiver or acceptance of an abandonment. The good sense of the contract leads to this conclusion, without a special provision in the policy; and we think that partial repairs, made in good faith by the master, at the port of distress, in order to sail his vessel to another port for full repairs at a less expense, and not for the purpose of restoring the vessel and continuing the voyage, are to be deemed acts done in preserving the property insured, which do not impair the owner's right to abandon.

In the suit upon the freight policy, nothing need be said, as there was a technical total loss of the vessel.

The proof, however, shows presumptively, a like total loss of the freight, independent of the loss of the barque.

The plaintiffs are entitled to judgment in both suits, as for a total loss.

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**VAN NATTA v. THE MUTUAL SECURITY INSURANCE COMPANY.**

A person insuring the cargo of a canal boat, generally, may in case of a loss, recover upon proving a special interest in the cargo, as a common carrier.

A party possessing merely a special interest in the subject matter insured, may always recover the value of that special interest, on an insurance of the entire subject matter.

In a declaration upon a policy of insurance on the cargo of a canal boat, it is a



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sufficient averment of the plaintiff's interest to allege that the insurance was for the account and benefit of the plaintiff as a common carrier.

And it is a sufficient averment of the liability incurred, for the plaintiff to state, in such a declaration, that an amount of goods exceeding that mentioned in the policy was entrusted to him as carrier, and that they were consumed by fire, and that the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment by the plaintiff, to the owners.

In a declaration upon a policy of insurance, a general averment of the plaintiff's interest in the property insured is sufficient.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, J. J.)

March 7; May 12, 1849.

DEMURRER to declaration on a policy of insurance. The declaration contained five counts. The first set forth that on the 21st July, 1847, the defendants executed to the plaintiff, a policy of insurance in the sum of \$5000, upon the cargo of the G. B. Webster, on her voyage from New York to Buffalo. That the insurance so made was for the proper account and benefit of the plaintiff as a common carrier for hire, of goods, &c.; that the cargo was shipped, July 22d, 1847, and the vessel left New York a day or two after, and that on the 31st of July, the boat and cargo were consumed by fire, without any evil practice on the part of the plaintiff, and that the plaintiff, as common carrier, was interested in the cargo to the whole amount, and became liable for the same to the shippers; that due notice was given to the defendants, and due proof of the loss, and of the plaintiff's interest, was made to them.

The second count set forth the policy, which provides, among other things, against all losses, excepting those occasioned by theft, robbery or barratry of the master or crew, or want of ordinary care and skill. Also, that in case of loss, the damage should be estimated according to the true interest and actual value of the property insured, at the time of the loss, and to be paid within 60 days after notice and proof thereof. And that in case of any loss by collision, or by the act of any person, the assurers were to receive all indemnities, that might be recovered therefor, in proportion as they had insured. The assured were not to abandon on account of the boat grounding, or being otherwise detained.

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The remaining averments were similar to those contained in the first count, except that there was no allegation that the insurance was made for the benefit of the plaintiff as a common carrier. The third count contained similar averments to the other two, except that it contained no allegation of the service of preliminary proofs of the loss upon the defendants, and it contained an averment that the plaintiff, at the time of the insurance and loss was "interested" in said cargo. The fourth and fifth counts were the common money counts.

The defendant demurred to the first three counts, and pleaded the general issue to the other two. The alleged causes of demurrer to the first count were that the plaintiff averred no interest in himself, or ownership of the cargo; that the policy insured losses by perils to the cargo, but that the plaintiff alleged that he was not the owner of the cargo, nor interested therein otherwise than as a carrier, and that there was no allegation that as such carrier, he had paid the value of the cargo, nor was there any allegation of such value. The causes of demurrer to the second count, were that the plaintiff did not set forth with any certainty in what manner, or how, he was interested, or in what his interest consisted; that although he stated he made proof of interest, he did not allege in whom such proof showed interest, nor the value of the same, nor whether it was an interest covered by the policy. Similar causes of demurrer were alleged as to the third count.

*E. Sandford*, for the plaintiff.

I. The interest of carriers in goods carried by them, in consequence of their liability to the owners, may be insured under a description of the goods themselves, without specifying the particular interest intended to be insured. (1 Phil. on Ins. 173; *Crowley v. Cohen*, 3 B. & Ad. 478; *De Forest v. Fulton Ins. Co.*, 1 Hall Rep. 84, 110, and the cases cited.)

II. The averment of interest is not necessary in a declaration founded on a policy upon interest; and where interest is averred it may be rejected as surplusage. (*Buchanan v. Ocean Ins. Co.*, 6 Cow. 318, 32; *Nautes v. Thompson*, 2 East, 392; 2 Phil. on Ins. 612, 613, 622; *Succua v. Crawford*, 5 B. & P.

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308; *Goram v. Sweeting*, 2 Saund. R. 202, 203; *Clendining v. Church*, 3 Caines, 141, 144; *Granger v. Howard Ins. Co.*, 5 Wend. 200; 2 Marsh. on Ins. 682; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall Rep. 84.)

III. The plaintiff, as carrier, had a special property in the goods and an interest in their safety, entitling him to effect a valid insurance thereon in his own name and to recover the whole value thereof, in case of loss. His insurance is upon the goods, though his indemnity is against the consequences of his implied guaranty for their safe carriage. And he is liable to the extent of the whole value of the goods, in the event of their loss. A common carrier is an insurer against fire. (*De Forest v. Fulton Ins. Co.*, 1 Hall R. 91, 99, 110, 121; *Crawley v. Cohen*, 3 B. & Ad. 478; *Oliver v. Green*, 3 Mass. R. 133; *Bartlett v. Natter*, 13 Mass. R. 267; Story on Bailments, § 507 a.; 2 Kent's Com. 597, 8.)

IV. It was not necessary, in order to show a right on the part of the plaintiff to recover under this contract of insurance, to aver that as carrier of the cargo, he had paid to the owner or shipper of such cargo, the value thereof or of any part thereof. There is no such stipulation or condition in the policy, and it is an accountability with which the underwriter has no concern whatever. The test of his liability is the insurable interest of the assured, and he is not interested in the disposition of the proceeds. (*De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 91, 110, 111, 116; *Worth v. Wilson*, 1 B. & Ald. 59; *Lyle v. Baker*, 5 Bin. 457; Sedg. on Dam. 370; 2 Duer on Ins. 23, 24, § 19; *Port v. Jackson*, 17 J. R. 239, 245, 6; Id. 479, 482, S. C. in error; *Matter of Negus*, 7 Wend. 499, 503, 4.)

V. The value of the cargo is sufficiently alleged. The general allegation of damage is sufficient, in pleading. The declaration shows that there was property at risk, and that a loss of that property occurred from a peril insured against; which it is alleged was more than the amount insured.

*F. B. Cutling*, for the defendants.

I. The policy does not contemplate nor cover an insurance

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against loss or damage to the cargo, incurred by the plaintiff as a common carrier.

II. Neither of the counts of the declaration avers any ownership in the plaintiff, of the cargo, or shows that he had any insurable interest therein, except so far as the risks assumed by him as a common carrier are insurable, and these risks are not covered by the policy.

III. If the policy shall be construed to insure the plaintiff against loss to him as a common carrier of the cargo, the declaration does not disclose sufficient to enable the court to say that the plaintiff had become liable to the shippers of the cargo, as a common carrier.

IV. Neither of the counts of the declaration sufficiently alleges or shows the amount or particulars of any liability incurred by the plaintiff as a common carrier, or any proofs of his actual loss furnished to the defendants, sixty days prior to the commencement of this action.

V. The declaration ought to have set forth the nature of the cargo, so far as to enable the court to see that it was within the terms of the policy; the true and actual value thereof, at the time the loss is alleged to have happened; the particular interest of the plaintiff in the cargo; and that proof of the loss sustained by the plaintiff, was made sixty days prior to the commencement of this suit.

BY THE COURT. SANDFORD, J.—The principal question raised by the demurrer, is whether the plaintiff, who insured the cargo of a canal boat, can recover upon proof of interest as a common carrier. It was decided by the King's Bench in *Cromley v. Cohen*, (3 B. & Ad. 478,) that the interest of a carrier in goods carried by him, was covered by a policy insuring goods in canal navigation boats, without any other description of the particular interest intended to be covered. The insurance was on "goods *as interest might appear*," but the case did not turn upon this clause. It was placed on the broad ground, that the subject matter of the insurance is to be properly described, but the nature of the interest need not be specially set out in the

policy ; that being a matter which bears only on the amount of damages.

The principle of this case is adopted by Mr. Phillips, in his *Treatise on Insurance*, (1 Phill. Ins. 173;) and an analogous principle had been applied in this court, four years previous to *Cronley v. Cohen*, to an insurance effected by a commission merchant, on goods in his possession for sale. (*De Forest v. The Fulton Fire Insurance Company*, 1 Hall's R. 84.) The very elaborate judgments given in that case, render it unnecessary for us to enlarge upon the reasons for permitting the assured to recover the value of his special interest on an insurance of the entire subject matter. The chief justice in his illustrations, (p. 110,) puts the precise case before us, of a common carrier, insuring the goods entrusted to him.

The objections made to this doctrine, will be briefly noticed.

1. That the carrier has not a proprietary interest in the cargo. This is equally applicable to a factor who has not made advances, so far as it is founded in law.

2. The policy, it is said, contemplates an abandonment; whereas the carrier has no interest to abandon; the only consequence of this is, that there can be no constructive total loss, and it is therefore in favor of the assurer.

3. The policy also contemplates the benefit of salvage and of substitution, neither of which can be had in respect of the interest of a carrier. As to the salvage, it is evident, that where the recovery can only be for actual loss, the assurer will have the full benefit of all salvage, in the diminished amount of such loss. And as to the substitution, none arises in consequence of the very restricted extent of the risks assumed. This leads us to speak in connection, of the fourth and fifth objections, which are, that many of the risks insured against are inapplicable to the interest of carriers, such as the perils of the river and canal navigation; and that the risks excepted, are the identical risks for which the carrier is liable to the owner, such as theft, robbery, barratry, undue lading, and want of ordinary care and skill in the navigation.

Both of these positions show how exceedingly restricted was the liability which the assurers assumed in favor of the carrier. In-

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deed, their counsel stated that the only risk they incurred, was that of fire. All these stipulations form a part of the policy ; but we are to bear in mind that a single printed form of the policy, is in practice, applied to all cases falling within one class, as for example, to all insurances on cargo ; and the uniform course is to construe them liberally, in respect of the actual interest and subject matter insured. If it were shown that the omission to describe the true interest of the applicant, led to the assumption of risks beyond those incurred by a simple description of the subject matter ; it might possibly furnish a good defence, as being a misrepresentation or concealment. But there is hardly a conceivable case, in which an insurance of the particular, special, or qualified interest in goods, will subject the assurer to a greater hazard, than he would incur, by insuring the same goods for the absolute owner. There is no possible ground for believing that a greater risk was incurred in the instance before us ; and we have no doubt that the plaintiff's loss was covered by the policy.

The averment of the plaintiff's interest is sufficient. In the second count, it is more specific than was requisite by the common law rules of pleading.

The liability incurred, is also sufficiently set forth. A loss by fire through misfortune, falls upon the carrier. (*Gould v. Hill*, 2 Hill, 623.) The counts state that an amount of goods exceeding that mentioned in the policy, was entrusted to the plaintiff as carrier, and was consumed by fire, and that he thereby became liable to pay to the respective owners, a greater sum than that insured. It was not necessary to aver actual payment by the plaintiff to the owners. And we think, considering the dates and circumstances, the averment made suffices for the actual value of the goods when destroyed ; if indeed, any averment beyond the carrier's liability to pay five thousand dollars for them, was necessary.

The presenting the preliminary proofs is stated in the two first counts. The proofs were those adapted to the interest of the assured. The third count is defective in omitting the allegation as to the preliminary proofs.

It was also objected to the third count, that it contained no

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avermment of interest. In fact, it contains the usual general averment of interest, instead of the statement of the particular interest disclosed in the other counts. In this respect, the count is good. Whether it can be supported by evidence of the special interest as common carrier, we need not determine. (See *Granger v. Howard Insurance Company*, 5 Wend. 202.)

The plaintiff is entitled to judgment on the demurrers to the first two counts, and the defendants are entitled to judgment on the demurrer to the third count of the declaration. The defendants may plead to the two former, and the plaintiff may amend the latter, within twenty days; without costs to either party.

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 WEBB v. THE NATIONAL FIRE INSURANCE COMPANY.

Capstans of locust partly prepared, for vessels which the insured was building, were held to be within his policy, "on his stock of ship timber, including locust, &c."

On the construction of a policy of insurance against fire, effected on a ship builder's stock of ship timber, "contained in the yard bounded by" three specified streets and the river, (in the city of New York,) proof was received to the effect that it was usual for the owners of ship yards in that city, to keep their stock of timber on the side walks, and in the streets in the vicinity of their yards, as much so as within the yards. Some of the timber of the insured, lay across the side walks, partly in the street, and partly on the land of the insured, which was only partially fenced. *Held*, that the evidence was properly received, to show what was the meaning of the terms "stock of ship timber in a ship yard," as used by the parties in the policy, and to define the term, yard of a ship builder. And there being no contradictory testimony, *held*, that the insured was entitled to recover for the loss of his timber, situated in the streets adjacent to his land.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, J. J.)

May, 1849.

ASSUMPSIT on a policy of insurance, tried before SANDFORD, J. in February term, 1849. The policy was dated August 20th,

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1847, and thereby the defendants insured the plaintiff for one year, "against loss or damage by fire, to the amount of;" (here followed the written portion of the policy, which was in the original, thus expressed and arranged, viz.)

"Six thousand, three hundred dollars, viz.

"\$3500 on his stock of ship timber, including planks, futtocks, knees, locust, standards, and stageings.

300 on his moulds and patterns.

500 on tree nails.

500 on blocks, falls, clamps, screws, augers and tools, contained in the yard and buildings therein, bounded by Sixth and Seventh streets, and Lewis street, and East river.

500 on his two story frame building, known as his office, situate in said yard.

500 on his draughts, books, papers, moulds and models, contained in said office.

500 on his stock of iron and tools, contained in the blacksmith's shop, situate No. 302 Lewis street.

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\$6300 one year, at 1½ p. c.	-	-	-	-	\$94 50
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It was admitted on the trial, that a fire occurred on the 8th of April, 1848, by which the property alleged to have been covered by the policy, was damaged; and that on the company being notified, the parties appointed Joseph Bishop and William Mackay, to appraise such damage. The appraisements made by them as after mentioned, were delivered to the company, and were received by the latter as preliminary proofs, and also as evidence of the loss occasioned by the fire.

The first appraisalment was produced and read to the jury, in these words, viz.

"We estimate the damage by fire which occurred on the night of the 8th inst., to the property of Mr. Wm. H. Webb, at his ship yard, situated at the corner of Lewis and Seventh streets, as follows:



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On timber lying in Seventh and Lewis streets, adjoining the buildings, at						\$1160 00
“ timber and plank lying in the yard,						1210 00
“ moulds and patterns,						300 00
“ treenails,						500 00
“ blocks, falls, tools, &c.,						500 00
“ draughts, books, papers, models, &c., contained in the office,						500 00
						<hr/> \$4170 00

JOSEPH BISHOP,  
WILLIAM MACKAY.

New York, April 11th, 1848.”

Mr. BISHOP, as a witness for the plaintiff, testified :

“ We were requested by the parties, or by one of them, I cannot say which, to make a separate estimate of the plank and timber that was prepared for the two steamships then building by Mr. Webb, for Howland & Aspinwall, we accordingly made an appraisement of this portion of the damaged property. This is the original.”

It was then read to the jury as follows :

“ We estimate the damage by fire to the timber, &c., prepared for the vessels now building in the yard of Wm. H. Webb, at six hundred and fifty dollars.

(Signed as before.)

New York, April 12th, 1848.”

The witness further testified :

“ It was also requested to appraise the damage to six capstans that were in Mr. Webb’s building in his yard. These capstans were partly made, and Mr. Mackay and myself appraised them at \$215.”

This last appraisement was then read in evidence as follows :

“ In addition to the estimate furnished 11th inst., there was in the building six capstans partly finished, valued at two hundred and fifteen dollars.

(Signed as before.)

New York, April 12th, 1848.”

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The witness further testified, that ship builders have been in the practice of having their stock of timber in the street in the vicinity of the ship yards, as much so as in the yard. Such has always been the practice since the witness has known anything of ship building in this city, and that has been for about twenty-five years.

This evidence of practice was objected to in due season by the counsel for the defendants as incompetent. The objection was overruled by the court.

The witness further testified : Capstans are made of locust, sometimes they are made partly of mahogany, but the capstans in the plaintiff's yard that were damaged by the fire were of locust. The stock specified in our appraisement consisted of what was wrought and prepared by the workmen as timber and stock ; and also of what was unworked. It was usual to store or keep in the yard and on the street, timber and plank indiscriminately. We keep the stock just where it is most convenient to place it ; we frequently have the heaviest of the timber in the street ; Mr. Webb's ship yard was not enclosed by any fence or enclosure. It had been enclosed at some period, but was not so then.

Ship yards are not usually enclosed. Mr. Webb's yard at some former period of time probably had been fenced in, because here and there were a few feet of old fence still standing. All of the timber that was burned, (and which is in dispute,) was on the side walks adjoining the yard on Lewis and Sixth streets.

WILLIAM MACKAY, on the part of the plaintiff, testified, that he was one of the firm of Westervelt & Mackay, ship builders of this city, and made the several appraisements with Mr. Bishop : that he has been engaged in the business of ship building for some twenty-five years past, and is acquainted with the course of business in this city. It is the practice of ship builders to keep their stock in their yards, and on the side walks, and in the street in the vicinity. Such has been the practice as long as the witness can remember.

(This evidence of practice was objected to as before.)

Being cross-examined, he testified : the timbers, the damage

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to which is valued at \$1160, lay on the side walk in seventh street, and the ends of some of the timber laid in the yard and some projected over the side walk, part projected inside and part outside of the fence, (was partly in the yard.) Cannot now say what proportion of it did project in the yard. There was no fence; the timber that projected and which was on the side walk, did not form a fence or enclosure. It was part of the plaintiff's stock. The yard was not enclosed; there might have been a few boards nailed to posts here and there at intervals.

WILLIAM E. KELLOGG, the secretary of the company, on the part of the defendants, testified, that Mr. Webb and the president of the company, adjusted the loss on the office which was burnt at \$400. That Webb signed a paper indorsed by the witness on the first appraisement, in these words, viz. :

"I hereby limit the loss under my policy for lumber in the yard, to five hundred and sixty dollars, having received from another source the difference between that amount and the twelve hundred and ten dollars claimed as loss for lumber in the yard as per the within appraisement.

New York, May 18th, 1848."

That witness was present at the conversation between Mr. Webb and the president respecting this deduction of \$650. Mr. Webb stated, that Howland & Aspinwall had received payment from one of the Fire Insurance Companies damage claimed by them upon policies upon their two steam-ships which was then building for them, and that they had given to him a part of the amount so received by them; and he stated that the money so received from another source, and witness believed it was under or from Howland & Aspinwall, had been to cover part of the items composing the sum of \$1210. That of the damage of stock in the yard amounting to \$1210, he had received \$650 from Howland & Aspinwall, and that he would only claim for the balance of that item, viz., \$560. He withdrew his claims for the six capstans contained in that schedule. The only subject of dispute was the timber in the street; the other matters were all settled.

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Being cross-examined, the witness says: My impression was that Mr. Webb had procured payment for the damage to the six capstans from Howland & Aspinwall, or the parties for whom he was building the steamers. I understood that the claim for the capstans was included in the \$650, and that it was withdrawn by Mr. Webb. The president agreed to pay him for all his claim except the lumber in the street.

Being shown the endorsement upon the appraisement by which the plaintiff limited his claim to \$560 he says: My recollection is that the six capstans were included in the amount therein referred to as having been received from another source. I so understood it, and that it was a part of the \$650, withdrawn from the claim of \$1210.

THOMAS W. THORN, the president of the company, testified, on the part of the defendants, that Mr. Webb and he agreed upon the appraisers. After the appraisements were handed to witness, he had another conversation with Mr. Webb, who in the course of it said he had received from Howland & Aspinwall a sum of money on account of the damage to their two steamers. Witness cannot say what the amount was, but it strikes him it was over \$2000 from them. The result of the conversation was, that he agreed to deduct from the claim of \$1210, the sum of \$650. Witness understood he had received his pay from H. & A. for the capstans and all the manufactured timber for those ships. He limited his claim for the balance to \$560. He gave up the claim for the capstans. The only thing about which we differed was the timber on the street. He understood that the \$650 covered all the work upon timber or lumber for the ships then building for H. & A. After they had adjusted the other claims, witness told Webb that he would not pay him for the timber on the side walks in the street. Witness offered to pay Webb the sum of \$2760, viz. for timber in the yard, \$560; moulds and patterns, \$300; treenails, \$500; blocks, falls and tools, \$500; office, \$400; on his draughts, &c., \$500.

It was then shown that the defendants tendered to the plaintiff the \$2760, with interest, and the costs of suit, in September, 1848; and the plaintiff received the same on account.

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JOSEPH BISHOP, being re-called by the plaintiff, testified (the counsel for the defendant objecting, and the objection being overruled,) that he and Mackay made a separate estimate of the various items of the damage forming the sum of \$650, included in the \$1210. He identified a paper shown to him as the original, made by him and Mackay at the time, and it was read to the jury as follows :

Deck plank,	.	.	.	.	.	\$415	
Labor,	.	.	.	.	.	35	
Beams,	.	.	.	.	.	85	
Labor,	.	.	.	.	.	15	
Rudder,	.	.	.	.	.	50	
Labor,	.	.	.	.	.	10	
Windlass,	.	.	.	.	.	28	
Labor,	.	.	.	.	.	12	
							6 capstans, \$215.

That Webb was then building the steam ships Panama and California, at the foot of Sixth and Seventh streets, for Howland & Aspinwall, and was also building the steam ship Cheokee, at the foot of Third street.

The court charged the jury that the principal question between the parties was whether the damage to the stock lying outside of the yard, and amounting to \$1160, was covered by the policy, and for the purpose of the trial, the court instructed them that the policy did extend to and cover the damage to such stock.

The other question in dispute relates to the damage to the six capstans. The defendants insist that the capstans are not covered by the policy, and if they be, that the damage thereto was included in the sums received by Mr. Webb from other sources. The court instructed the jury that the policy did extend to and protect the capstans, and submitted to the jury the questions of fact, whether the damage to the capstans had been made good to the plaintiffs as insisted by the defendants. He directed the jury in case they found the question in favor of the plaintiff to find a verdict for the sum of \$1500, otherwise to find a verdict for the sum of \$1250. (The counsel on both sides having agreed to adjust the precise amount of the claim

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after the construction of the policy had been settled by the court.) The court further, at the request of the defendant's counsel, charged the jury that if, on the evidence, they believed the plaintiff withdrew his claim for the capstans, having received the value thereof under the policies effected by the owners of the vessels, though they were not included in the items making up the amount of \$650, the plaintiff was not entitled to reassert his claim or to recover for them.

The jury found a verdict for the plaintiff for \$1500 damages.

The defendants moved for a new trial.

*J. H. Lee* and *J. R. Whiting*, for the defendants.

*F. B. Cutting*, for the plaintiff.

BY THE COURT. OAKLEY, CH. J.—All the claims arising from this loss, were amicably settled between the parties, except the plaintiff's claim for the capstans and for the timber situated on the side walks adjacent to the premises called the ship yard. At the trial, the inquiry as to the capstans was two-fold; first, whether they were within the policy; and second, whether the plaintiff had been paid his loss in that respect by the owners of the ships which he was building, and for which the capstans were preparing. The judge held at the trial, that they were within the terms of the policy, as timber in process of being wrought into vessels; and this was undoubtedly correct. The question as to the plaintiff's having received his loss upon the capstans from another source, was submitted to the jury, who were instructed, in accordance with the defendants' request, that if he had so received it, he could not recover it from them. The jury found that the plaintiff had not received this portion of his loss from any quarter, and we see no reason to interfere with their conclusion.

The main question in the case, arises on the other part of the claim, and is, whether the timber on the side walks was within the stock insured by the policy. The defendants contend that the risk is confined expressly to timber in the yard as bounded

by Sixth and Seventh streets, Lewis street, and the East river; and that the court is to consider the sides of the streets and the margin of the river, as having been deemed the boundaries of the yard, as if the words to be construed were found in a conveyance of land.

The plaintiff's premises were an unfenced yard. Some fence remained along portions of the yard adjacent to the street, while along other portions there was none. The plaintiff offered to prove, and did prove, that it was usual for the owners of ship yards in this city, to keep their stock of timber on the side walks and in the streets in the vicinity of their yards, as much so as within the yards. It further appeared that the ends of some of the sticks of timber, embraced in the appraisal as timber outside of the plaintiff's inclosure, in fact projected into the inclosure, and across the line where the fence had formerly been. This testimony was objected to by the defendants, but it was received by the judge, and it was properly admitted. The object of the evidence of *usage*, (as it is called,) in these cases, is to ascertain what is the meaning of the language used by the parties in their contract; whether by the words "stock of ship timber in a ship yard," was meant a yard bounded by lines exactly defined, and limited by streets or other lineal land-marks, or a yard as it was in fact used by ship builders in conducting their business.

There was no good objection to the evidence offered on this point; and it being uncontradicted, it was sufficient to establish the usage, and to prove that a ship yard embraces the ground adjoining the inclosure, so far as it is used for keeping the stock of ship timber there provided for use.

There is another point of difficulty to the defendants, if the *usage* were excluded: viz., whether the insurance is at all confined to stock in the plaintiff's yard. On reading the policy, it will be perceived that there is no such limitation in the clause relating to the stock of ship timber, &c., on which \$3500 were underwritten; and three new lines, with as many distinct subjects of insurance, intervene before the yard is mentioned.

It is a serious question whether the yard, as thus mentioned, applies at all to the first subject insured, and if it were neces-

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sary to decide the point, we should be inclined to hold that it does not. We are satisfied, however, that the verdict should be maintained on the other ground, and the motion for a new trial must be denied.

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GILBERT and others v. HAVEMEYER and others.

THE SAME v. EVANS.

The statute relative to opening streets in the city of New York, confers upon the commissioners of estimate and assessment, the power to assess an occupant of lands benefited by the improvement.

An occupant is a person "interested" in the lands which he possesses, within the meaning of the statute.

Where commissioners of estimate and assessment described minutely a parcel of land assessed for benefit, and stated that it was owned by A., and was occupied by G., P. and T., and they assessed upon it the sum of \$123; *Held*, that this was a sufficient assessment not only of the lot, but of A. as owner, and of G. P. and T. as occupants or parties interested.

*Held also* that it was to be presumed, from their assessing the owner and occupant jointly, for the entire sum, that the commissioners did not fully know the respective estates and interests of the parties.

An assessment, on being confirmed, becomes a lien upon the lot assessed, and the owner and occupant, and each of them, becomes liable to pay the same. If it is not paid, on demand, the corporation may collect it by a warrant against the goods of the owner or occupant.

The statute authorizes the corporation to appoint a collector, with power to levy an assessment upon the goods of the person assessed.

A warrant is not void because it directs the assessment to be collected of persons who may be occupying the premises, as well as of those assessed by name. It cannot be levied upon the goods of occupants who have not been assessed by name; but the insertion of such a direction in the warrant will not prejudice those against whom it is properly issued.

A warrant which omits to state the names of the persons assessed, is fatally defective.

A warrant, issued for the collection of an assessment, should state when the assessment was confirmed by the supreme court; the names of the persons assessed, both owners and occupants, who have neglected to make payment; the amount of the assessment; and should describe the premises assessed. These particu-



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lars, if not contained in the warrant itself, should be inserted in the schedule forming a part of it.

The warrant should contain all the facts necessary to show that the person upon whose goods it is levied is liable to pay the sum claimed from him.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, J. J.)

March 28; May 19, 1849.

THE first of the above suits was an action brought by the plaintiffs against the defendants, who were commissioners of estimate and assessments, in the matter of widening and opening William street, to recover damages for an alleged illegal levy upon and sale of their property. The second suit was brought against Evans the collector, who executed the warrant issued by the commissioners for the collection of the assessment.

The action was commenced under the code, and the pleadings consisted of a complaint, answer and reply. The causes were heard upon the pleadings. The facts are as follows: The plaintiffs were the occupants of certain premises in John street, in the city of New York, which had been assessed by the defendants for the benefit and advantage of the widening and opening of William street, to the amount of \$123. The reports of the commissioners of estimate and assessments contained a description of the premises in question, together with an allegation that the same were owned by Isaac Adriance, and were occupied by the plaintiffs, and had been assessed for benefit and advantage. The report of the commissioners was confirmed by the supreme court, May 14th, 1847.

The assessment remaining unpaid, on the 16th of August, 1848, the defendants in the first suit issued their warrant to the defendant Evans, the collector appointed for that purpose by the corporation, which warrant was signed and sealed by them, and was as follows:

“By William F. Havemeyer, Esq., Mayor, C. Crolius, Morris Franklin, Theo. R. De Forest and Edward Fitzgerald, Esq., aldermen of the city of New York, to Lemuel G. Evans of the fifth ward of said city. You are hereby commanded and required to demand and receive from the several persons named in the annexed list of return, or who may occupy the premises the sums of money set opposite their names, being the money

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assessed to them for widening and extending William street, which sum they have hitherto neglected or refused to pay, together with the interest and expenses thereon, and upon neglect or refusal of payment, you are hereby authorized and required to levy the said sums of money, with such interest and expenses, by distress and sale of the goods and chattels of the persons so assessed and named in said annexed list, or those who may occupy the premises and neglecting or refusing to pay the same, returning the overplus money (if any there should be) after deducting the sum or sums so assessed, with such interest and expenses and the charges of distress and sale, to the person so assessed, or to his or their legal representative. Given under our hands and seals, this 16th day of August, 1848."

Under the warrant thus issued, on the 4th October, 1848, the collector levied upon the merchandize of the plaintiffs, to the amount of \$138 94, and took possession of the same, which was sold for the assessment in question.

*R. Mott*, for the plaintiffs.

*A. J. Willard*, for the defendants.

BY THE COURT. SANDFORD, J.—It is contended, that the statute, relative to opening streets in this city, does not confer upon the commissioners of estimate and assessment, the power to asses an occupant of lands supposed to be benefited by the improvement; or if it do, then that the assessment cannot be made on both the owner and occupant.

The first position is maintained on the omission of the word "occupant," in the one hundred and seventy-eighth section, which regulates the proceedings of the commissioners; and on the argument that unless they be lessees for long terms, occupants cannot in the nature of things, derive much benefit from a street opening.

The argument from the degree of benefit, is quite as strong, against the propriety of assessing occupants for the expense of constructing sewers, and pitching and paving streets under the one hundred and seventy-fifth section; and against the second

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assessment which the corporation, by section one hundred and eighty-five, may make on opening streets ; (in both of which they are named ;) as it is against assessing them by the commissioners of estimate and assessment.

On examining the one hundred and seventy-eighth section with much care, we are satisfied that the plaintiffs' construction is erroneous in both of the positions assumed. The assessment for benefit, is to be made upon "the owner or owners, lessee or lessees, parties and persons respectively, who may be interested in or entitled unto the lands" benefited and lying within the apparent limits. The same language, substantially, is used in respect of lands of which a part is taken for the street, and the residue is benefited more than the value of such part.

The section, both in respect of assessments for benefit and awards for damage, includes every possible interest in the lands benefited, and in those taken for the public use. An *occupant* is a person "*interested in*" the lands which he possesses.

In every case where the respective estates and interests of the owners and parties interested are unknown or not fully known to the commissioners, the section permits them to assess upon the "owners and proprietors generally of such lands and parties interested therein ;" the sum to be allowed and paid by them in respect of the whole estate and interest of all persons in the respective parcels assessed, without specifying the estates or interests of any of the persons so assessed. The sum is to be assessed upon the owners *and* persons interested ; not upon either alone to the exclusion of the other.

In this case, the commissioners described minutely the parcel assessed for benefit, stated that it was owned by Isaac Adriance, and was occupied by Gilbert, Prentiss and Tuttle, (the present plaintiffs,) and they assessed upon it one hundred and twenty-three dollars.

This we consider a sufficient assessment not only of the lot, but of Adriance as owner, and of the plaintiffs as occupants or parties interested. The commissioners were public officers, and we are bound to assume from their assessing the owner and occupant jointly for the entire sum, that they did not fully know the respective estates and interests of the parties.

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The assessment was therefore valid, and on being confirmed, became a lien upon the lot assessed, and the owner and occupant and each of them, by section one hundred and eighty-six, became liable to pay the same. If it were not paid on demand, the corporation could collect it by a warrant against the goods of the owner or occupant.

It remains to consider the several objections made to the warrant, under which the collector seized the plaintiffs' goods.

1. It is said the statute does not authorize the corporation to appoint any person collector, with authority to levy the assessment on the goods of the party assessed. We decided that there was no force in this objection, in the recent case of *Wetmore v. Campbell*, which arose on the collection of a sewer assessment by warrant. The same point was decided by the late supreme court, upon a statute precisely like the one in question. (*Trustees of Rochester v. Symonds*, 7 Wend. 392, 395.)

2. The warrant, it is said, is void, because it directs the collection to be made of persons who may be occupying the premises, as well as of those assessed by name. We held in *Wetmore v. Campbell*, that the warrant could not be levied upon the goods of occupants who had not been assessed by name; but the insertion of this direction in the warrant, does not prejudice those against whom it is properly issued. As to all others, the officer is bound to disregard it; and if disregarded, it will hurt no one. If it were obeyed by the officer, the persons actually assessed, could sustain no injury. An idea was suggested, on the argument, that the warrant directed the overplus to be returned to one person, when it might have been made by a sale of the goods of another; but this is wholly unfounded. The collector is commanded to return any overplus, to the "persons so assessed," being the persons upon whom he is to levy the assessment. If he levy upon the occupant, he must return the overplus to him; and payment to the owner assessed, would not discharge the collector.

3. It is insisted that the warrant is void on its face, and does not protect even the officer, because it shows no jurisdiction or authority to issue it.

This is clearly erroneous. The statute conferred jurisdiction

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upon the mayor and four aldermen, to issue such a warrant as this, for an unpaid assessment imposed on widening a street; and the fact that there was such an assessment, and that payment had been refused, is set forth in the warrant. (*Savacool v. Boughton*, 5 Wend. 170; *Trustees of Rochester v. Symonds*, before cited.) It shows that a legal and valid charge has been created, and by what tribunal or authority.

4. The only difficulty of a serious nature, remains to be considered. The warrant does not set forth that the charge was made upon or against the plaintiffs. So far as the warrant is stated in the pleadings, it contains no reference to the premises assessed, nor does it state what persons were assessed. In the suit against the collector, it is expressly alleged that the plaintiffs' names were not mentioned in the list or return annexed to the warrant; so that there is no room for inference, by connecting the warrant with the valid assessment, if inference could be legitimately resorted to in its support.

In the suit against the mayor and aldermen, the warrant itself is set forth, containing a reference to a list annexed; but the list is not set forth, and it does not appear that the plaintiffs were named in the list.

This is a fatal defect in the warrant; and although it is unfortunate that the plaintiffs should thus recover back a valid assessment, which they were liable to pay, and for which a warrant was issuable; they cannot be subjected to pay it by a process which does not refer to them either by name or by a sufficient description.

Besides the matters contained in the warrant set forth in these pleadings, it should state when the assessment was confirmed by the supreme court, the names of the persons assessed, both owners and occupants, who have neglected to make payment, the premises assessed (by some brief but intelligible description,) and the amount of the assessment. There may be other matters necessary to be stated, to which our attention has not been directed. Those enumerated, we are confident ought to be inserted in the warrant itself, or in the schedule forming a part of it. The warrant should contain all the facts necessary to show

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that the person upon whose goods it was levied, is liable to pay the sum claimed from him.

Judgment for the plaintiffs.

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MEAKINGS v. CROMWELL and others. (a)

Where a testator, by his will, after giving to his wife the rents of certain premises during her life, devised as follows: "after her death, the house and lot, the corner of Amity and Greene streets, to be sold, and the net proceeds equally divided between B. H. O., J. H. O., and their sister C. O., share and share alike;" *Held*, that a power in the executors to sell the premises, after the death of the widow, was to be implied.

*Held also*, that an execution of such power by one of several executors, the others not having qualified, was valid.

Whenever a power is given, in a will, to sell lands, without expressly naming a donee of the power, and the proceeds of the sale are to go to pay debts or legacies, or to be distributed, the power vests in the executors, unless a contrary intent appears.

Such an implication is much strengthened by the circumstance that two of the persons who are the objects of the testator's bounty, and who are beneficially interested in the execution of the power, are named as executors.

The nominal consideration of one dollar, expressed in a deed, is enough to sustain the deed, so as to pass the legal estate. The question whether such conveyance was fraudulent in fact, cannot be raised in the action of ejectment to try the legal title.

(Before OAKLEY CH. J., and VANDERPOEL, J.)

May 19, 1849.

EJECTMENT for a lot of land at the corner of Amity and Greene streets, in the city of New York. The cause was tried in June, 1848, before OAKLEY, CH. J., without a jury, when a

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(a) Judge SANDFORD having been consulted on this will, before he came to the bench, did not sit in this case.

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verdict was found for the defendants. The facts are sufficiently stated in the opinion of the court.

*Knox and Mason, and E. Sandford*, for the plaintiff.

*C. T. Cromwell and G. L. Isham*, for the defendants.

BY THE COURT. OAKLEY, CH. J.—This is an action of ejectment, brought by Meakings against Cromwell and his tenants, to recover possession of the house and lot at the corner of Amity and Greene streets, in this city.

Both parties claim title under Benjamin Hyde, who was seised in fee of the premises, in 1833, and being so seised, made a will in due form of law, to pass real estate, and by that will, after giving to his wife the rents of the premises in dispute during her life, devised as follows: "after her death, (of his wife,) the house and lot the corner of Amity and Greene streets, to be sold, and the net proceeds equally divided between Benjamin Hyde Old, Joshua Hyde Old, and their sister, Caroline Old, share and share alike." These were the nephews and niece of the testator. The will then proceeded to appoint Jane Parks Meakings, Benjamin H. Meakings, Joshua Hyde Old, and Benjamin Hyde Old, his executors and executrix. At the time of making the will, these nephews and his niece were aliens; the nephews residing in this country, with the testator, and Caroline residing in England, where she has always lived, and now resides. After making the will, and prior to the death of the testator, Benjamin Hyde Old, one of the nephews, died. The testator died in 1835, leaving his will unrevoked, the nephew and niece being still aliens.

Letters testamentary were granted on the will, to Jane Parker Meakings alone, (the other executors not having qualified,) and in July, 1847, a deed was executed by her, as executrix, to Richard Reed; and Reed, in October, 1847, conveyed by warranty deed to Cromwell, under which deed he claims title.

The plaintiff, Meakings, claims title by virtue of a quit-claim deed to him from Joshua Hyde Old.

On the argument, several questions were raised on the plain-

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tiff's title, some of which are not without difficulty. The view that we have taken of the case, renders it unnecessary to consider those questions. If the grounds on which we are about to dispose of the case shall prove to be untenable, those questions will still be open to the defendant.

The deed of Jane Parks Meakings was executed, under the idea that a power to sell the premises in question, is to be implied in the executrix.

This presents the questions :

1st. Whether there is such implied power under the will ;  
and

2nd. Whether it was well executed.

We have looked at all the cases cited by counsel on the argument, and we have come to the conclusion that there is a power implied in the executors to sell ; and that its execution by the executrix, who alone has qualified, is valid.

The authorities are collected in Sugden on Powers, page 153, (Ed. 1847). Without going minutely into these cases, we think there is clearly to be derived from them this principle, that whenever a power is given, in a will, to sell lands, without expressly naming a donee of the power, and the proceeds of the sale are to go to pay debts or legacies, or to be distributed, then the power vests in the executors, unless a contrary intent appears.

The cases in 2 Leon. 220, and 2 Dall. 223, are very like the present ; and although they are not fully reported, the court seems to have considered the principle as very clear. In the case in Leonard, the proceeds of land ordered to be distributed, are considered in the nature of legacies, and the payment of legacies being among the appropriate duties of an executor, the power to sell lands for such purposes, has always been held to vest in him by the implied intent of the testator.

This rule, as I have above stated it, is clearly laid down in the court of errors, in *Bogert v. Hertell*, (4 Hill, 500,) where Justice NELSON says, "it is settled law, since the year books, that a power, given in a will, to sell land, for the purpose of paying



debts and legacies, or for *making division* of the proceeds, without naming the donee, will vest in the executors by implication."

In this will, such an implication is, in our judgment, much strengthened by the circumstance that the two nephews, who were the objects of the testator's bounty, and who resided in this country, are named as executors. They were beneficially interested in the execution of the power; and it is a strong ground for inferring the intent of the testator, that *they* should execute the power of selling who were to receive a portion of the proceeds, and who, therefore, would have every inducement to see that the power should be faithfully executed.

There seems, indeed, to have been little else for the executors to do, under this will, but to carry out the testator's intention in regard to his nephews and niece, who, as aliens, being incapable of taking and holding the lands under a devise, were intended to have virtually the same thing, under a bequest of the proceeds in the nature of legacies, which they might take. The proceeds of the land, here come in the place of legacies, and were clearly intended as such.

The object, in all these cases, is to arrive at the intention of the testator; and if the intention can be fairly ascertained from the whole will, it must be carried out. Now, looking at this will, and seeing that the purpose of the testator was to convert the house and lot in question, into money, for distribution among those for whom he wished to provide, and who could not avail themselves of the provision in any other form; and that for the general purpose of executing his will, he named, (among others,) as his executors, the distributees of the fund, to be created by the sale of the land; we cannot doubt that it was his intent that his executors should have the power, to carry his will, in this respect, into effect.

It was contended on the argument by the plaintiff's counsel, that this case falls within that section of the revised statutes (vol. 1, 734, § 100,) which provides, that when the testator omits to designate who shall execute a power in a will, its execution shall devolve upon the court of chancery. It was an ordinary exercise of the jurisdiction of that court, to appoint a trustee to execute a trust or power, to prevent a failure of it, in cases

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where no trustee was named or designated. We think the intent of the statute, was nothing more than to regulate and fix by law, what had been merely the practice of the court.

The court of chancery always upheld the doctrine of implied powers in executors to sell land, when such implication could be made according to the intent of the testator. We think an implied designation is sufficient; and that it was not intended by the statute, to abolish the whole doctrine of implied powers in a will. Indeed, trusts by implication of law, in wills, are expressly preserved by 2 R. S. 135, § 71.

The execution of the power, by one of the several executors, the others not having qualified, is valid. (*Ogden v. Smith*, 2 Paige, 195. *Roseboom v. Mosher*, 2 Denio, 61.)

The consideration expressed in the deed of the executrix, is one dollar. It was contended, that this execution of the power was void, as being fraudulent upon its face. The nominal consideration of one dollar is enough to sustain the deed, so as to pass the legal estate. The question whether it was a fraudulent execution in the action of ejectment, to try the legal title; and especially in this case, as no point of that kind was made at the trial.

The court, as the case comes before us, cannot undertake to determine whether there was any actual fraudulent intent, on the part of the executrix, in executing the power of sale; and we cannot say that a deed, with a nominal consideration, executed under such a power of sale, is, in judgment of law, fraudulent and void. An adequate consideration, in fact, may be shown to have been actually paid. And we probably ought to infer such to be the case; particularly as against the present defendant, who, for aught that appears, was a bona fide purchaser, and for a full consideration.

Judgment must be entered for the defendants.

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Murtha v. Walters.

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**MURTHA v. WALTERS.**

The affidavit that the justice before whom a suit is pending, is a material and necessary witness for the defendant; must state facts and circumstances, clearly showing that the justice's testimony is indispensable.

The opinion of the party, with facts that show the justice might be a material witness, but which do not show him to be a necessary witness, are not sufficient to require him to enter a discontinuance.

Decided Feb. 24, 1849.

**APPEAL** from one of the justice's courts. Murtha sued Walters for use and occupation. Walters thereupon prepared an affidavit, setting forth that the justice before whom the suit was pending, was a necessary and material witness for him, and that he could not safely proceed to trial without the testimony of the justice; that the same cause of action had been tried between the same parties a few days previous, and submitted to the same justice upon the merits; who after deliberation gave judgment for the defendant in that former suit. The defendant offered to make oath to the affidavit, and asked the justice to receive it and enter judgment of discontinuance. The justice refused to administer the oath, proceeded to try the cause, and gave judgment for the plaintiff; upon which Walters appealed.

*J. H. Ehle*, for the appellant.

*G. Defendorf*, for the respondent.

**BY THE COURT.** VANDERPOEL, J.—The justice was right in refusing to render judgment of discontinuance in this case. Before he is authorized to do so, he must be satisfied that he is a material witness, and that without his testimony, the defendant cannot safely proceed to trial. (Laws of 1838, p. 232, § 1.)

We do not mean to say that we would not interfere, if a case were presented, where the affidavit clearly showed the justice to be an indispensable witness. We do not think the justice would be justified in opposing his own opinion as to his materiality to facts and circumstances in the affidavit, clearly showing him to

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be material. But we have no hesitation in saying, that the affidavit or statement here offered, did not show the justice to be a material witness. If the cause had before been tried before the same magistrate, and was finally submitted to him, these facts could be easily proved without the oath of the justice. His minutes and the clerk of the court could show the trial and judgment, and all those present at the trial could have established the fact of its final submission to him, on the merits. The legislature could not have intended that too great facilities should be given to defendants to procure the discontinuance of actions against them, on the ground of the materiality of justices as witnesses. The affidavit tendered must clearly and indubitably, by the facts it states, and not as mere matter of opinion, show the justice to be an indispensable witness for the defendant.

As the affidavit, if sworn to, would have been insufficient, the justice did not commit a fatal error by refusing to administer the oath to the defendant. The judgment must be affirmed.

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**FORD v. G. and G. W. BABCOCK.**

A plea is not made double, by the averment of facts, which, without such averment, would be implied.

To render a plea double, its averments must set up more than one defence.

An unnecessary averment, not amounting to a defence, will not render a plea double.

It may be rejected as surplusage.

The provision in the statute of limitations, that if when any cause of action accrue against any person, *he shall be out of this state*, such action may be commenced within the terms by the statute before limited, after the return of such person into the state ; applies to both residents and non-residents.

A return into the state, is sufficient to set the statute in motion, without any residence here.

Facts showing the defendant to be within the exception in that clause of the statute, need not be negatived in his plea. It is incumbent on the plaintiff to prove such facts.

In a plea that six years have elapsed since the return of the defendant into this state, it is not necessary to aver that such return was public and notorious, so that the

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plaintiff with due diligence might have arrested him. It is sufficient to plead the return in the words of the statute. On the trial, in order to sustain the plea, the defendant must prove such a public and notorious return.

The new exception created by the revised statutes, viz. that "if after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action," is not confined to residents of this state when the cause of action accrued. It extends also to non-residents. If there be successive absences, they must be accumulated and deducted from the term of limitation allowed by the statute.

Therefore, under the present statute, it must appear that the defendant was within the state during six years after the cause of action accrued, in order to create a bar coming within the limitation of six years.

The superior court, as now constituted, is co-ordinate with the supreme court. The decisions of the latter are not authoritative, although to be treated with great deference and respect.

The case of *Cole v. Jesup*, 2 Barb S. C. R. 309, commented upon, and its conclusion denied.

(Before DUER, MASON and CAMPBELL, Justices.) May 17 ; June 4, 1849.

THIS was an action of assumpsit, by the indorsee, against the drawers of a bill of exchange. The defendant, G. Babcock, appeared and pleaded. The case came before the court on demurrers. The pleadings are sufficiently stated in the opinion of the court.

*H. H. Stuart* for the defendant, G. Babcock, cited *Didier v. Davison*, 2 Barb. Ch. R. 477 ; *Randall v. Wilkins*, 4 Denio, 577 ; *Cole v. Jesup*, 2 Barb. S. C. R. 309 ; *Ruggles v. Keeler*, 3 Johns. R. 267 ; *Fowler v. Hunt*, 10 Johns. 464.

*J. Laroque*, for the plaintiff, cited 3 Johns. R. 264 ; 10 Ib. 464 ; *Tuttle v. Smith*, 10 Wend. 386 ; *Huntington v. Brinckerhoff*, 10 Ib. 283.

BY THE COURT. DUER, J.—This is an action upon a bill of exchange, by the plaintiff as an indorsee, against the defendants as drawers. In addition to a count on the bill, the declaration contains the usual money counts. One of the defendants, Giles Babcock, has interposed several pleas ; and to his third plea, the plaintiff has demurred. On the part of the plaintiff, there are several replications to the second plea, and to the second and fourth of those replications, the defendant has demurred. It is

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upon the issues of law joined upon these demurrers, that the cause has been heard ; and as no exceptions have been taken to the declaration, our attention will be confined to those that have been taken to the pleadings that are alleged to be vitious.

The third plea, omitting the introductory part, avers in substance that the several causes of action accrued to the plaintiff more than six years before the commencement of this suit, and that when they accrued, the defendant was a resident of the state of Louisiana, and was out of this state, and that after they so accrued, and more than six years next before the commencement of this suit, he returned into the state of New York. The plea is founded on the first clause of section 327 in that article of the revised statutes which relates to the time of commencing personal actions, (2 R. S. 297.) That clause provides in substance, that "if at the time when any cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms before limited, after the return of such person into the state." This provision is substantially a re-enactment of the law as it formerly existed. It was originally borrowed from the English statute of Queen Anne (4 and 5 Anne, c. 15, sec. 19,) and the exception which it creates, however doubtful the interpretation may seem,—it appears to be settled, applies as well to non-residents, as to persons, who, although residents, were out of the state when the cause of action accrued. Such at least has been the law in this state, since the judgment of the supreme court in *Ruggles v. Keeler*, (3 Johns. R. 263,) although the English cases there cited, seem hardly to support that decision. The same construction has been given to the statute in Massachusetts. (*Dwight v. Clark*, 7 Mass. 515 ; *Little v. Blunt*, 16 Pick. 359.) The demurrer to this plea is special, and assigns five several causes of exception. The first cause is, that the plea is double, setting up two distinct and separate defences, viz. : 1st, that the causes of action did not accrue within six years next before the commencement of the suit ; and 2d, that when they accrued, the defendant resided in Louisiana, and that the suit was not commenced within six years after his return. We are satisfied that the demurrer cannot be sustained upon this ground. A plea is not rendered double by an express

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avermment of facts that without such an averment, must have been implied ; the unnecessary averment may be rejected as surplusage, but cannot vitiate a plea otherwise valid. It was admitted by the counsel for the plaintiff, who argued the case with singular candor, as well as ability, that the objection of duplicity could not have been raised, had the plea been limited to the averments that the defendant was out of the state when the causes of action accrued, that he afterwards returned, and that more than six years had elapsed since his return, before the commencement of the suit : yet it is evident that these averments involve, by a necessary implication, the assertion that more than six years had elapsed since the causes of action accrued. An express averment of the same fact, has not the effect of introducing a new and distinct issue. It alters the form of the plea, but leaves the substance and meaning unchanged. The fact that more than six years had elapsed since the causes of action accrued, and more than the same period since the return of the defendant, were both necessary to be stated to complete the bar that the plea was intended to raise. Had the plea been framed, as it was insisted it should have been, the plaintiff might have replied, by taking issue upon either of these facts, and it is therefore certain that no separate defence is set up by the express averment.

In support of the objection we are now considering, we are referred to the case of *Tuttle v. Smith*, 10 Wend. 288, but, in reality, the decision in that case, so far from sustaining the objection, justifies us in overruling it. The plaintiff replied to an ordinary plea of the statute of limitations, that the defendant had made a new promise, and that the suit was commenced within six years after the promise was made ; the defendant rejoined taking issue upon both facts, the new promise and the commencement of the suit within the period allowed by the statute. This rejoinder was the pleading demurred to, and the court held it to be double, upon the ground that the denial of either of the facts upon which issue was taken, would have been a complete answer to the replication :—but the replication was admitted to be valid, because those facts were necessary to be combined in one statement, in order to avoid the operation of the statute. There is a

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perfect analogy between the replication in that case and the plea in the present.

The second cause of demurrer is, that the plea does not aver that when the causes of action accrued, the defendant resided out of this state, but only that he was out of the state at that time. This is a mistake; the plea does contain the averment in question, and had it been omitted, the omission would not have vitiated the plea. The statute is satisfied by an averment that the defendant was out of the state when the cause of action accrued. An opposite construction would confine its application to non-residents, whereas the only doubt has been whether it applied to them at all.

The next cause of demurrer is, that the plea does not show that the defendant ever acquired a residence in this state, or ever ceased to be a resident of Louisiana, nor for how long a space of time he was within this state, and the reply is, that these averments were not merely unnecessary, but that their introduction would probably have vitiated the plea. They give a construction to the statute not justified by its language, and inconsistent with all the decisions. They imply that a debtor permanently residing in New Jersey or Connecticut, may in the transaction of his business, visit the city on every day of his life, and yet during his life, the statute never commence to run.

The fourth cause of demurrer is, that the plea does not negative the exception created by the second clause in the 27th section of the statute, the terms of which in the progress of our opinion will be fully stated. This objection must also be overruled. Where the statute of limitations is pleaded, it lies upon the plaintiff to aver, not upon the defendant to deny, the existence of facts that create an exception from the general rule that the statute establishes. It has, however, been decided by this court, that the particular exception to which this cause of demurrer refers, is never necessary to be stated in the pleadings, but that when issue has been taken upon a general plea of the statute, the facts that create the exception may be given in evidence upon the trial in contradiction of the plea. This decision was rested upon the peculiar words of the statute, and is fully justified by prior decisions of the supreme court in analogous



cases. (*Graham's Executors v. Schmidt & Webb*, 1 Sand. Sup. C. R. 74.)

The last clause of demurrer is that which was chiefly relied on, and merits the most consideration. It is that the defendant has not averred in his third plea that his return to this state was public, or that the plaintiff had due notice thereof, or could with due means and ordinary diligence have had process of law served upon him. The construction of the statute that is here assumed to be correct, is established by numerous decisions. It is fully settled, that where the debtor was out of the state when the cause of action accrued, his return, in order to set the statute in motion, must be such in its nature and duration, as to afford the creditor the opportunity of commencing a suit and prosecuting his claims. It must appear, when the return is pleaded, that it was either actually known, or was so public that with ordinary diligence, it might have been known to the plaintiff when it occurred. But although in order to give efficacy to the return, these circumstances must be proved on the trial, it by no means follows that they are necessary to be averred in the plea ; on the contrary, the very cases that are justly relied on as showing the true interpretation of the statute, equally show that no such necessity exists. When a statute is pleaded, whether as conferring a right or sanctioning a defence, we have always understood that the safest, if not the necessary course, is to adopt and follow in the pleading, the very words of the law, and if we except the single case to which we shall hereafter refer, we are not aware that the efficacy of a plea which sets up a defence in the very words in which the defence is given by a statute, has ever been doubted. In very many cases, the interpretation that courts of justice have given to a statute, differs widely from the literal import of its language ; but it has never been thought necessary or prudent to depart from the language of the statute in order to conform a pleading to its known judicial interpretation ; and the reason is evident. When the words are identical, it is the plain duty of the judges to give to them in the pleading, the same construction as in the statute. The plea in this case is in exact conformity to the statute ; it says all that the statute requires to be said, and the word " return " in the plea, has the same mean-

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ing as in the law. It means such a return as the courts have decided to be necessary, in order to set the statute in motion, and it is such a return that in order to sustain the plea, the defendant will be obliged to prove. It is not, however, to be denied that the objection we are now considering, is fully sustained by a recent decision of the supreme court in the fourth judicial district, in the case of *Cole v. Jessup*, 2 Barbour, S. C. R. 309. In that case a rebutter, that the suit was not commenced within six years next after the return of the defendant, was held to be bad, from the want of an averment that the return was such as the law in similar cases requires to be proved; and this decision, were the judgments of this court now subject to a reversal in the supreme court, we should be bound to follow. But in the exercise of its rightful jurisdiction, it is to the court of appeals only that this court is now subordinate, and although the decisions of the present supreme court must always be treated by us with great deference and respect, yet as they no longer preclude the exercise of our discretion, they cannot be admitted to control our action. We cannot surrender to their authority alone, without a plain dereliction of duty, our own deliberate convictions. We are therefore constrained to say that we cannot yield our assent to a decision which as it seems to us violates the established rules of pleading, and is inconsistent with all the prior decisions on this branch of the statute in the courts of the United States, of this state and of other states in the Union. (*Faw v. Roberdeau*, 3 Cranch, 174; *Fowler v. Hunt*, 10 Johns. 464; *White v. Bailey*, 3 Mass. 271; *Little v. Blunt*, 16 Pick. 369.)

In the cases to which we refer, it is expressly stated, that when a defendant seeks to avail himself of the statutory bar by pleading his return, he is bound to prove all the facts of which the existence is necessary to render the bar effectual, even where none of those facts, except by implication of law, have been averred in his plea. The want of such an averment cannot therefore be a valid cause of demurrer, since it is an elementary rule that an express averment of material facts is only necessary to be made, when it creates an obligation that would not otherwise exist of proving upon the trial the facts that it embraces. The averment is useless, if striking it out, the obligation remains.

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The introduction of such an averment may not vitiate a plea, but its absence can never justify a demurrer. It was truly said, by the very able judge who delivered the opinion of the court in *Cole v. Jessup*, that the burthen of proving the facts that the law requires to be shown, to render the return of a debtor effectual, as the origin of the statutory bar, is justly cast upon the defendant, and this observation was evidently the ground of the decision; but it escaped the attention of the learned judge and of his brethren, that according to all the prior decisions, the omission to aver these material facts neither lessens the obligation, nor shifts the burthen of proving them.

As all the exceptions to the third plea have now been examined and found insufficient, the demurrer is overruled.

We are next to consider the demurrers of the defendant to the second and fourth replications to his second plea.

The second plea is a plea of the statute of limitations in the ordinary form, namely, that the causes of action had not accrued within six years next before the commencement of the suit; and the object of the second and fourth replications is to repel the defence, by the allegation of facts which it is supposed will entitle the plaintiff to the benefit of the exception, that the second clause in § 27 of the statute was meant to create. There are objections both of form and substance to each of these replications, that in the result must compel us to allow the demurrers, but without adverting for the present to these objections, we shall proceed to explain our views in relation to the questions that the pleadings were intended to raise, and which upon the hearing were ably and learnedly discussed by the counsel. We adopt this course not only in compliance with the wishes of the counsel as then expressed, but that the plaintiff, should he think proper, may amend his replications in conformity to the opinion that we shall express.

The questions that we propose to consider are, 1st. Whether the new exception that § 27 creates, is confined in its proper application to persons who were residents in this state when the cause of action accrued; and 2d. Whether in the cases to which this exception applies, it is the first period of absence only, and not successive periods, that must be deducted and allowed.

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That the import of these questions and our observations in relation to them, may be properly understood, it will be necessary to transcribe, not only the clause containing the exception, which we are required to construe, but the entire section. It is in these words :

§ 27. "If at the time when any cause of action specified in this article shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into this state." *"And"* (which is the clause now to be considered) *"if after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."*

The first clause, as already stated, is a re-enactment of the existing law, but the second was introduced for the first time in the revision of 1830. It is not contained however, in the original report of the revisers and hence in judging of the meaning, we are deprived of the aid that their notes have frequently supplied.

After an attentive consideration of the clause, we have been unable to discover any valid, or even plausible, reason for confining its application to persons who were residing, or, without being residents, were within the state, when the cause of action accrued. Such assuredly is not the grammatical construction of the words, nor can we believe that the limitation of their obvious meaning, was contemplated by the legislature. Following the strict grammatical rule, the words "such person," can only be referred to the person last mentioned, that is a person who was out of the state when the cause of action accrued, and afterwards returned, thus wholly excluding residents from the exception that follows ; but if we reject this interpretation, as without hesitation we do reject it, as creating an unreasonable distinction between residents and non-residents,—the words "such person" must then be referred to the person first mentioned in the section, that is, any person against whom a cause of action shall accrue ; and thus construed, both classes, residents and non-residents, or more properly speaking, persons within and persons out of the state, when the cause of action accrued, are plainly included.

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It therefore seems to us impossible to deny, that in order to justify the limited construction that would confine the application of this clause to persons against whom the statute commenced to run, at the same time that the cause of action accrued, we must suppose that the legislature has omitted words, which, as necessary to carry into effect their manifest intention, it has become the duty of courts of justice to supply. We must add to the words "such person," the words "being at such time an inhabitant of the state," or others of equivalent import. That such an interpolation in *some* cases may be justified, and in many has been made, we do not deny; but we are fully convinced that in the construction of statutes, it ought never to have been allowed, and in fact has rarely been made, except when necessary to complete the sense or escape a flagrant absurdity. It ought never to be allowed, unless the intent which it is designed to effectuate, is manifest and unquestionable, and if we depart from *this rule*, judges ceasing to be the mere expounders, will become the makers of our laws. There is no pretence for saying, in the present case, that the interpolation which we reject, is manifested as the intention of the legislature, either by the terms of the statute or the certain design of its enactment, and for ourselves we are persuaded that its adoption, instead of effecting, would probably defeat, the intentions of the lawgivers, by creating a distinction that was never meant to exist.

In our judgment, to confine the application of the clause, to residents of the state, would be at least as unreasonable as wholly to exclude them and, looking merely to the words of the clause, far more so. We shall be better understood when we shall have explained our views as to the intention of the legislature, and the true construction of the entire section, as we propose to do, in considering the second question that has been stated.

That question is whether, when a person against whom the statute has commenced to run, departs from, and resides out of the state, the operation of the statute is only suspended until his return, or whether, if during his residence out of the state, there are successive periods of his absence, each must be deducted from the six years which the statute allows to a creditor for the commencement of his suit. Upon the first interpretation, the first

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return of the debtor not only sets the statute again in motion, but precludes its further suspense ; upon the second, the debtor who pleads the statute, must prove that, in the aggregate, deducting the period of each absence, he was six years within the state, after the cause of action accrued, and before the commencement of the suit. Each interpretation is consistent with the language of the statute ; the first is the most literal, the second expresses, we believe, the true intention of the legislature, and therefore we adopt it. That it was the intention of the legislature to make an important change in the existing law, has never been doubted ; and that we may judge of the nature and extent of the change that was intended, we must look at the actual condition of the law at the time it was proposed. Now there is one rule, that courts of justice, in construing these provisions in the statute of limitations that relate to personal actions, had uniformly followed, and which the words of that statute compelled them to follow, namely, that when the statute began to run, it continued to run, without interruption, until the terms of limitation that the statute prescribes had fully expired. The statute once attaching, no subsequent disability of plaintiff or defendant was permitted to suspend its operation. Thus if a debtor, (and it was undoubtedly the relation of debtor and creditor that the legislature had chiefly in view in altering the statute,) were in the state when the cause of action accrued, (whether the fact was known or not known to the creditors,) the statute commenced to run ; and although he departed the next day or hour, and remained out of the state during the whole residue of the six years allowed by the statute, the lapse of that period was held, in effect, to extinguish the debt, by creating an insuperable bar to its recovery. It is true if the debtor were out of the state when the cause of action accrued, his absence prevented the statute from beginning to run ; but his return, by setting the statute in motion, and prohibiting its future suspense, was productive of similar effects ; he might remain within the state only a few days, depart and be absent, for the residue of the six years, and the creditor's remedy was for ever barred.

That this rule was purely arbitrary, and that it was unequal and therefore unjust in its operation, will hardly be denied ; and

it is important to observe that its injustice was even apparent, and confessed upon the face of the law, as it then stood.

The only reason that can be assigned for permitting the absence of a defendant, when the cause of action accrued, to prevent the statute from beginning to run, is the inability of the plaintiff to prosecute his claims, during such absence, unless by resorting to a foreign tribunal; and admitting the justice of this exception, it seemed a necessary inference, that the same inability, when proceeding from the same cause, should be allowed to suspend the operation of the statute, in every case, in which it is proved to exist. In fewer words, if the absence of a defendant when the cause of action accrued, justly prevents the statute from beginning to run, it is equally just, that his absence, after the statute has commenced to run, should suspend its operation.

It is just that the same time and opportunity should be afforded to a plaintiff in all cases for commencing a suit in the courts of this state, that he actually possesses when the defendant is and continues to be a resident of the state. We believe that it was exactly this change that the legislature meant to effect and have effected. We believe that it was their intention to abolish the former, by the substitution of a different rule, more just in its principle and more equal in its operation, and just as universal in its application, embracing every case and all classes of defendants. The rule thus established, we understand to be, that every defendant who pleads the statute is bound to prove that, deducting each interval of his absence, he was within the state six years, (or a shorter period when a shorter is the statutory bar,) after the cause of action accrued, and before the commencement of the suit, and that the rule, thus expressed, is subject only to this single and reasonable modification, that where a defendant against whom the statute has begun to run, is a resident of the state and continues to reside therein, his occasional absences are not to be deducted in computing the statutory term. By this construction, the provisions of the statute are rendered plain and consistent, and equal in their operation upon all classes of plaintiffs and defendants, and the change that is made is seen to be, and is vindicated as, real and important. By the opposite construction, that on which the defendant's counsel insisted, the



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change is rendered trivial and almost unmeaning, the provisions of the statute obscure, and, in a measure, contradictory. The former inequitable rule continues in force as to all defendants who were out of the state when the cause of action accrued, and, in respect to residents, the rule is not abolished, but only slightly modified; the motives of a change thus partial and unimportant are not to be discovered, and all questions as to the object and intentions of the legislature remain unanswered.

Hitherto, we have not adverted to the actual decisions upon this branch of the statute, and it is with some reluctance that we advert to them at all. They exhibit a conflict of opinions which it is difficult to explain and impossible to deny, and which can only be terminated by a decision of the court of ultimate and controlling authority.

The earliest case is that of *Randall v. Wilkins*, 4 Denio, 577. The defendant who pleaded the statute, resided out of the state, when the cause of action accrued, and continued so to reside until the commencement of the suit, but in this interval he was at various times publicly within the state. The court held that his first return after the cause of action accrued, set the statute in motion, and that it continued to run from that time;—his subsequent departure from and residence out of the state not suspending its operation, thus necessarily deciding that the exception in the second clause of section 27, is only applicable to persons who are within the state when the cause of action accrues. *Cole v. Jessup*, (2 Barbour S. C. R. 309) a case to which we have before referred, in its material facts differs not at all from the preceding; but while the court in this case expressed no doubt, and in fact decided that the new exception in the statute applies as well to non-residents as to persons within the state when the cause of action accrues, they held that successive absences cannot be accumulated, for the purpose of being deducted from the full period of time which the statute allows, but that the law is satisfied by deducting the first absence after the cause of action has accrued. They referred, in support of this decision, to a similar decision made by Mr. Justice Nelson, in the circuit court of the United States. (*Dorr v. Swartwout*, reported in 5 New York Legal Observer, page 172.) It is however, to be ob-



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served, that this decision was originally made with great hesitation, and we are credibly informed has since been overruled in the same court.

Directly opposed to those which have been cited, are the decisions to which we shall next advert. The first of these is *Burroughs v. Bloomer*, a case not hitherto reported, but which was decided by the judges of the supreme court as formerly organized, during the last year of its constitutional existence.<sup>(a)</sup> We have been furnished with a copy in MS. of the opinion of the court in this case, from which it appears, that although the questions raised were substantially the same as in the cases first quoted, the conclusions of the judges were widely different.

The learned judge who delivered this opinion, examines critically, and in the result wholly repudiates, the opinion of Mr. Justice Nelson, in *Dorr v. Swartwout*; and the conclusions which he states, as the grounds of the decision of the court, are, that where a defendant against whom a cause of action has accrued, departs from and resides out of the state, not only may successive absences be accumulated and deducted, but, in the judgment of law, he is deemed to be absent, during the whole period that he so resides, so that the running of the statute, not merely until he returns, but until he fixes again his residence in the state, is wholly suspended. We refer to this decision as plainly contradicting *Randall v. Wilkins*, and *Cole v. Jessup*, but are not to be understood as assenting to its novel doctrine of constructive absence.

In *Didier v. Davison*, (2 Barb. Ch. R. 477,)<sup>(b)</sup> we find, at last, that we are supported by high authority in the construction we have given to the statute. Chancellor Walworth is clear in the opinion, that the exception in section 27, embraces all defendants against whom a cause of action has accrued, and that where such a defendant has departed from and resides out of the state, each period of his absence, when there are several, must be deducted in determining the question whether the statutory term of limitation has expired; and exactly the same construction must have been given to the statute by this court in the case of *Graham's Executors v. Schmidt*, (1 Sand. Sup. C. R. 74,) since

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<sup>(a)</sup> Now reported in 5 Denio, 532.

<sup>(b)</sup> S. C. 2 Sandf. Ch. R. 61.

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it is the only construction by which the decision in that case can be explained and defended. Whether the sad uncertainty in which the true construction of the statute of limitation is now involved, will soon be dispelled, we know not ; but if our own views shall finally be declared erroneous, we shall retain the satisfaction of knowing that they coincided entirely with those of Chancellor Walworth, and of the judges with whom we are now associated.

Although the general argument of the plaintiff's counsel, in endeavoring to bring his case within the exception of the statute, has received our assent, it by no means follows that we can sustain the replications demurred to. They are fatally defective. The second replication is plainly argumentative. It leaves us to collect, by inference, material facts that ought to have been explicitly averred : it avers that the defendants resided in the state of Louisiana, when the causes of action accrued, but does not aver that they were at that time out of this state ; and if at that time they were in this state, although residing in Louisiana, it was then that the statute began to run. Nor are the several departures from, and returns into the state of the defendants, stated with the precision and certainty that the law requires. Their existence is supposed, certainly, not averred.

To the fourth replication, we shall state a single but very decisive objection. It attempts to exclude the defence of the statute, by averring that the defendants were not residents within this state for a term of six years, in the aggregate, before the commencement of the suit, thus assuming that a residence of six years within the state, is necessary in all cases to complete the statutory bar,—a construction of the statute which, although not absolutely novel, we unhesitatingly reject, as repugnant alike to its spirit and its language. Residence is not necessary in any case, either to set the statutory term in motion, or to continue, or revive, its currency.

In conclusion, the plaintiff's demurrer to the third plea is overruled. The demurrers of the defendants to the second and fourth replications to the second plea are allowed, with liberty to the plaintiff to reply to the third plea, and to amend or withdraw his insufficient replications, within the usual time. We strongly ad-

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wise the plaintiff's counsel, instead of amending, to withdraw entirely his replications, and content himself with a general traverse of the second plea, since it is quite certain, that under this traverse, he may give in evidence all the facts upon which he relies as overruling a defence upon the statute.

No costs are given, as we understood the counsel to agree that whatever might be our decision, none were to be claimed.

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**BOGGS, Administrator, &c. v. FORSYTH.**

A plea to a bill to set aside a settled account on the ground of fraud, is not rendered double by setting up that the cause of action arose more than ten years, and the fraud, if any, was discovered more than six years, before the bill was exhibited. Both averments are necessary to constitute a bar, under the limitation in the statute relied upon as a defence.

In such a case, the plea need not deny the fraud charged in the bill.

An answer, admitting certain facts charged as those from which the plaintiff claims to have first derived notice of the alleged fraud, denying that he did thereby first acquire such notice, and setting up facts showing a notice at a much earlier period, which latter were not inconsistent with the facts admitted; is a sufficient answer in support of such a plea of the statute.

(Before DUER, MASON and CAMPBELL, J. J.)

May 18; June 4, 1849.

THE bill in this cause was filed to open and set aside a settled account, on the ground of fraud.

It alleged in substance, that the complainant, on the 31st of May, 1836, was appointed administrator, with the will annexed, of Sarah Jones, deceased, and that the defendant became one of his sureties in the administration bond. That not long after his appointment, the plaintiff assigned to the defendant a portion of the assets of the estate, to be applied by him in the payment of certain legacies of the testatrix.

That on or about the 20th of December, 1837, the plaintiff and defendant came to a settlement, which resulted in the defendant's giving to the plaintiff a note for \$450, payable in three months, as the balance in his hands due to the estate of Jones,

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and thereupon the plaintiff gave the defendant a receipt in full of all demands.

The bill then alleged, that the settlement was effected by false and fraudulent statements of the defendant; that there were overcharges, errors, and mistakes, in the account, which are particularly specified in the bill; and that the plaintiff did not discover the fraud which had been practiced upon him, till the fall of the year 1845, when it became manifest from the letters and accounts furnished to him by the defendant in the course of a correspondence which he had commenced on the subject of the settlement.

The defendant pleaded, as to all the relief prayed for by the bill, and as to all the discovery, except that part which related to the discovery of the fraud in 1845, that the plaintiff's cause of action, if any, accrued more than ten years before the exhibiting of the bill, and that the facts in the bill stated as constituting the fraud alleged by the plaintiff as the ground of relief, were not, nor were any of them, discovered by the plaintiff within six years next preceding the exhibition of the bill; and he accompanied his plea with an answer in its support.

*W. H. Taggard*, in support of the plea.

*H. S. Mackay*, for the plaintiff.

BY THE COURT. MASON, J.—On the argument of the plea, the counsel for the plaintiff objected, that the plea was double, that it did not deny the fraud charged, and that it was not supported by the answer.

The objection of duplicity does not appear to be well taken. It is true that two different sections of the statute are referred to and relied on, and that these two sections apply to different causes of action; but the defence is single, to wit, that the claim is barred by the statute of limitations. The original case made by the bill, is one which is not cognizable by the courts of common law, and is one to which therefore the limitation of ten years is applicable. But the plaintiff having, in order to avoid the bar of the statute, which might be set up, alleged that the

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fraud in the settlement was discovered only a short time before the filing of the bill, it became necessary for the defendant either to deny the fraud, or to deny its discovery by the plaintiff within six years.

The plea of the ten years limitation would have been unavailing, unless the equitable circumstances stated in the bill in avoidance of the statute, were also denied; and on the other hand, the denial of the discovery within six years would have been of no consequence, unless it also appeared that the original cause of action was barred by the statute applicable to it. So that it was necessary to plead both the ten years and the six years limitation, in order to give a complete answer to the bill.

A similar question arose in the case of *Forbes v. Shelton*, (8 Simons, 335,) where the defendant pleaded two different statutes of limitation, the statute of 21 James, and that the cause of action did not accrue within six years, and also the statute of Geo. 4, and that he had not made any acknowledgment of the debt within six years. It was objected, that the plea was double, but the vice-chancellor held, that it could not be considered as a double plea, for although the two acts were passed at different times, they ought, he observed, to be considered as jointly making one bar. He held, however, that it was unnecessary for the defendant to have pleaded the statute of Geo. 4, inasmuch as there was no allegation in the bill that any acknowledgment had been made; thereby intimating that the second branch of the plea would have been necessary had the bill contained any such allegation.

It was next urged, that the plea should have denied the fraud charged in the bill, and various authorities were cited in support of this position.

It is undoubtedly the general rule, that when in anticipation of a bar that might be set up by the defendant to the plaintiff's claim, such as a release, the bill alleges that the release was obtained by fraud, the plea setting up the release should also deny the fraud; yet in a case like the present, the defendant is at liberty either to deny the fraud altogether, or to deny the discovery of the fraud within six years. (Story's Eq. Pl. 754.) Indeed, the absolute denial of the fraud is inconsistent with the

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plea that it was not discovered within six years, since in the very terms of the plea, there is an implied admission of the fraud for the purposes of the plea.

• The only remaining question is, whether the answer sufficiently denies the equitable circumstances which are alleged in the bill, in avoidance of the bar of the statute.

Those circumstances are, in substance, that the plaintiff, in or about the fall of 1845, commenced a written correspondence with the defendant, in the course of which the defendant inclosed in a letter to the plaintiff the account mentioned in the bill, and that the developments contained in that letter, and the advice which the plaintiff received thereon, enabled him for the first time to discover the fraud stated in the bill, which he did not fully understand or discover until the receipt of such account and letter, and that he was not apprised until then of the design of the defendant to appropriate to himself, and keep in his own possession and use, the sum of \$1600, on pretence of paying the same over to Sarah Bassett, one of the legatees in the bill named.

These are all the equitable circumstances set up in the bill as to the discovery of the fraud, and in avoidance of the statute; and the answer, while it admits the correspondence and the transmission of the letter and account before referred to, yet explicitly and fully denies that the plaintiff was enabled to or did thereby discover the fraud charged in the bill; on the contrary, it alleges an express agreement between the plaintiff and defendant, in December, 1837, that the defendant should retain the \$1600 in his hands until it could be paid according to the terms of the will, and denies the discovery by the plaintiff within six years next preceding the filing of the bill, of any material fact alleged in his bill, of which he was previously ignorant.

We think the answer is sufficient to support the plea.

Plea allowed.

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Carpenter v. Provoost.

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**CARPENTER, Executrix, &c. v. PROVOOST and others.**

The representatives of a surety in a joint bond, not liable at law for the debt by reason of the survivorship of the principal obligor, cannot be compelled in equity to pay the obligation.

The remedy in equity against a deceased joint debtor, is limited to those cases in which he had a benefit from the consideration upon which the obligation arose.

(Before DUER, MASON and CAMPBELL, J. J.)

May 23 ; June 4, 1849.

THE bill in this cause was filed on the following state of facts : On the 14th of January, 1839, John S. Provoost, and his mother, Mary T. Provoost, since deceased, executed their joint (but not several) bond to Charles Carpenter, for the sum of fifteen hundred dollars, and to secure its payment, they executed a mortgage which conveyed the interest of John S. Provoost in certain real estate in the county of Westchester, of which his father had died seised. Mrs. Provoost, it was contended, mortgaged her interest in the property, but as she had only a life estate, it became immaterial to consider the effect of her execution of the mortgage. The bill was filed to foreclose this mortgage, and it sought to charge the estate of Mary T. Provoost, (of which the defendants, William and James Provoost, were executors,) for any deficiency which might remain after the sale of the real estate.

The bill was taken as confessed by John S. Provoost. William and James Provoost put in their answer, alleging first, that under the will of the late William Provoost, the father of all the defendants, John S. Provost did not take any estate which he could mortgage ; and, in the second place, that Mrs. Mary T. Provoost executed the bond in question as a surety for John S. Provoost, who borrowed from Carpenter for his own benefit the money for which the bond was given ; and that she having since died, they, as the representatives of her estate, are not liable in law or in equity ; and lastly, that they have fully administered upon her estate, and that no claim was made on this bond within the time allowed by law.

Pending the suit, C. Carpenter died, and the suit was revived

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in the name of the complainant as his executrix, on the motion of the defendants.

*W. Inglis*, for the complainant.

*E. Pierrepont*, for the defendants.

BY THE COURT. CAMPBELL, J.—Without going into details in reference to the interest of John S. Provoost in the estate of his father, we entertain no doubt that he had such an interest as could be sold, assigned or mortgaged. He will be entitled to his share of the proceeds of the real estate, at all events, on the death of his sister, and there is nothing in the will of his father which prevents him from making such disposition of that interest as he pleases.

The objection is not well taken by the defendants that they have fully administered, as the decree would only affect assets which may hereafter come into their hands.

The fact, however, which is set up in the answer of the executors, and which must be taken as true, that Mrs. Provoost executed this joint bond as a surety for her son, must control the question of their liability as executors under any circumstances affecting the present condition of the estate. As against her separate estate, the bond is not good, either in law or in equity. In all the cases where courts of equity have interfered and decreed against the representatives of a deceased joint obligor, there was a legal or equitable claim against such deceased obligor at the time of his entering into the joint obligation. It was thus in the case of *Simpson v. Vaughan*, (2 Atk. 30,) and in *Thomas v. Frazer*, (3 Ves., jun., 399.) In the former of these cases, the doctrine is first laid down by Lord Hardwicke, and for more than a century it has continued to be the rule of the English court of chancery, and it has been adopted with scarcely an exception by American courts of equity. In the great case of *Devaynes v. Noble and others*, (1 Merivale, 563,) Sir William Grant discusses this doctrine with signal ability, and he re-affirms it in the case of *Sumner v. Powell*, (2 Merivale, 36.) In the latter case, he says, "The



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question is, whether any other effect can be given to this covenant in equity than it has at law. It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenanters. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But these all have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that created the liability to pay." And in the case of *Hunt v. Rousmanier*, (8 Wheaton, 174,) Chief Justice Marshall says: "That the courts are uniform in presuming a mistake in point of fact, in every case where a joint obligation has been given and a benefit has been received by the deceased obligor; that no proof of actual mistake is required, and the existence of an antecedent equity is sufficient;" and he adds, "In cases attended by precisely the same circumstances so far as respects mistake, relief will be given against the representatives of a deceased obligor who had received the benefit of the obligation, and refused against the representatives of him who had not received it." The doctrine is thus summed up by Jewett, Justice, in the recent case of *Bradley v. Burwell*, (3 Denio, 65.) "It is a general principle, that in case of a joint bond or obligation, if one of the obligors dies, his representatives are at law discharged from liability to the obligees, and the survivor alone can be sued. But in equity, the representatives of such deceased obligor are liable, unless the deceased was a mere surety; in such case, even equity will not extend by implication the responsibility from that of a joint to a joint and several undertaking."

The answer of the executors alleges, that the bond and mortgage were given in this case to secure money borrowed by John S. Provoost, and his mother executed them as his surety. The representatives of her estate should not, therefore, have been

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made parties to this bill. A decree may be taken for the sale of John S. Provoost's interest in the real estate described in the mortgage, and charging him personally for any deficiency. The bill must be dismissed as to the executors of Mrs. Provoost, with costs up to the time of their motion for the revival of the suit, to be paid out of the estate of Carpenter in the hands of his executrix.

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**LAWRENCE v. POOL.**

**A plea to a bill charging fraud in procuring a surrogate's decree, which merely sets up the decree and alleges that all the parties in interest had notice of the proceedings, without denying the fraud, is bad.**

**In equity, in the argument of a plea, the defendant cannot object to the sufficiency of the bill.**

**(Before DUER, MASON and CAMPBELL, J. J.)**

**May 23 ; June 4, 1849.**

**THE** bill was filed by the complainant as a creditor of the estate of Isaac Lawrence, deceased, in behalf of himself and such other creditors as should choose to come in and contribute to the expenses of the suit. The object of the bill was to recover back a sum of money received by the defendant, out of a fund in the hands of the surrogate of the county of New York, created by the sale of I. Lawrence's real estate, and to restrain any further receipts. The bill charged that the order of the surrogate declaring the defendant a creditor, under which he received the money claimed, was obtained by him by a variety of fraudulent representations and suppressions—that there was nothing due to the defendant, but that he owed the estate; and that the estate was insufficient to pay all the just debts. Some other matters are stated in the opinion of the court.

The defendant interposed a plea in bar, setting forth the proceedings before the surrogate, upon his claim against the estate.

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That it was referred by the defendant and the administrator of I. Lawrence to three referees approved by the surrogate, and the reference made a rule of the supreme court. That the referees reported nearly \$14,000 due to the defendant, and their report was confirmed by the supreme court, and a judgment rendered thereon. That the surrogate afterwards, on due notice &c. to all interested, proceeded to ascertain the debts against I. Lawrence, and decreed the defendant's to be a valid and subsisting debt to the amount of the judgment, and directed distribution to be made rateably, under which decree the defendant received the money in question.

*L. B. Woodruff* and *G. Wood*, for the defendant.

*W. B. Lawrence*, for the complainant.

BY THE COURT. MASON, J.—The well established rule at law, that upon the argument of a demurrer to any pleading the previous pleading of the party demurring may be shown to be bad, has never been adopted in equity, and the party pleading to a bill is not allowed to sustain his plea by proving the bill to be defective. . (*Sperry v. Miller*, 2 Barb. Ch. R. 632.) It is unnecessary therefore to express an opinion upon the objections taken by the defendant's counsel to the sufficiency of the bill in this case. The plea must stand or fall upon its own merits.

The bill was filed to set aside a decree of the surrogate of the county of New York, in favor of the defendant, against the estate of Isaac Lawrence, deceased, which is alleged to have been obtained by false and fraudulent representations, and fraudulent suppressions of important facts. It specifies a number of circumstances in which the fraud is said to consist, and also alleges that all the facts of the case and the fraudulent nature of the transaction, were unknown to the administrator of Isaac Lawrence, and had been discovered by the plaintiff but a short time previous to the filing of the bill.

The plea merely sets up the decree without any denial of the fraud, or any other allegation whatever, except that all parties

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interested had notice at the time the decree was rendered ; and it is not accompanied by an answer.

The rule in cases of this kind is thus stated by Chancellor Walworth : " Where fraud or other circumstances are charged for the purpose of avoiding a release, (and the same is true with regard to a decree or judgment) the defendant pleading, must by proper negative averments in his plea, deny the allegations of fraud &c., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill, to avoid the bar. (*Bolton v. Gardner*, 3 Paige 273.) See also Story's Equity Pleading, § 671, 681.

The plea must therefore be overruled, and the defendant must answer the bill and pay the costs of the hearing within ——— days of the service of the order.

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CURRIE v. W. STEELE and others.

To sustain a compromise, made between litigant parties, it is not necessary that each should know all the facts bearing upon the extent of his claim ; provided the sacrifice made by him in the compromise, is not proved by him to have been greater than he would have made for the sake of a settlement, if such facts had been fully known to him

The assets of a decedent at the time of his death, were in the hands of one who claimed as sole legatee, and so continued. The wife of the deceased, (whose relation as wife was contested,) opposed the probate of his will, and succeeded before the surrogate and on two appeals. Pending a third appeal, she compromised and settled the controversy, by receiving all her costs and charges, and a sum in gross, less by about one-fourth than her share of the estate. The amount of the estate was in fact, about one-fourth larger than she was aware of when she settled. In a suit by her to set aside the compromise, *Held*, 1st. That it was not to be treated as one made between trustee and beneficiary, or between parties standing in a confidential relation to each other. 2nd. That she was not entitled to relief on any ground, it being quite apparent that she would have settled in the same manner if she had known the amount of the estate.

Where a gift in the nature of one *mortis causa*, is given upon a condition or understanding that it is all the donee shall receive from the donor's estate ; on the latter's overturning the cotemporary disposal of the estate, and coming in to share it, in

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violation of such understanding, she will be required to account for the amount of such donation.

(Before DUEB, MASON and CAMPBELL, J. J.)

May 24, 25, 26 ; June 9, 1849.

THIS was a suit in equity, commenced in the late court of chancery, to set aside a compromise and settlement, made by the complainant in the latter part of April, 1843, with the defendant, William Steele. It appeared that Mungo Currie, of the city of New York, who from 1815, till his death on the first day of November, 1840, was either a clerk of, or kept an office with, W. Steele, left a will in his own hand writing, and apparently duly executed, by which he left all his property to his uncle, Robert Thompson, then the senior partner of Steele. This will was dated October 27, 1840, and had subscribed to it the names of John Gemmel and Phœbe Finch as witnesses.

It was delivered by Currie to W. Steele on the day of its date, together with an order drawn by Currie in his own hand, on Thompson & Steele, in favor of "Sarah Finch" for one thousand dollars, which Steele, (on being requested by the complainant,) accepted at C.'s house on the same day. The order was in these words :

"In consideration of kindness and attention to me for the last twenty years, pay Mrs. Sarah Finch one thousand dollars in case of my demise. Five hundred dollars on the first day of February, and five hundred on the first day of May, both next ensuing.

MUNGO CURRIE.

To Messrs. R. Thompson & W. Steele."

The complainant, Sarah Currie, formerly Sarah Finch, claiming to have been married to Mr. Currie for twenty years before his death, contested the proof of the will before the surrogate, on its being presented for probate by Thompson. After a contest before that officer, he decided that there had not been a sufficient publication of the will to entitle it to probate.

Thompson appealed from this decision, and it was affirmed by the circuit judge.

In December, 1841, R. Thompson died, having appointed the defendants, William and Robert Steele, his executors. They

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appealed to the chancellor from the decree of the circuit judge, and the appeal was dismissed by default. The chancellor refused to open the default in October, 1842, and from his order to that effect, the Steele's appealed to the court for the correction of errors. In the case before the circuit judge, and the chancellor, and in the latter court, Richard Mott was the solicitor for Mrs. Currie.

The order or draft for \$1000, was paid by Mr. Steele to Mrs. Currie, (who receipted the amount as "Sarah Finch,") out of M. Currie's funds in the hands of Thompson & Steele. In fact, Currie's estate consisted of bonds, mortgages and securities, in their hands, with the exception of a little household furniture which remained in the possession of Mrs. Currie. The amount on the 18th August, 1843, was \$8748 97, as appeared by the inventory then filed by W. Steele as administrator. The executors of Thompson retained these securities while the litigation continued. They denied that the plaintiff ever was the wife of M. Currie, or that in case of an intestacy, she would be entitled to any part of his estate. They relied upon his letters, and various circumstances, in proof of this position. On the other hand, Mrs. Currie proved conclusively in this suit, that she was married to Currie as long ago as 1824 or 1825.

While the appeal was pending in the court of errors, negotiations for a settlement of the controversy were conducted between W. Steele and the solicitor for Mrs. Currie; which after a considerable discussion and the gradual yielding of Steele as to the amount, resulted in her agreeing to receive \$3500 and her costs, in full of all her rights and claims in and to the estate of Mungo Currie, and to permit Steele to take out administration. This compromise and settlement was carried into effect on the first day of May, 1843. Mrs. Currie executed to W. Steele a full release and assignment under seal. of all her rights, interests and claims in and to the estate; and Steele paid her the consideration agreed upon, \$3500; and also paid to Mott, her solicitor, \$300, in full for his costs and counsel fees.

The bill, filed in 1844, sought to set aside this release and assignment, on the ground that Mrs. Currie was kept in ignorance of the value and extent of Currie's estate; and charging fraud

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and collusion between her late solicitor and W. Steele, in effecting the settlement. The defendants in the suit were William and Robert F. Steele and R. Mott. They all answered, denying the personal imputations and other charges made by the bill, and insisting that the release was executed fairly and in good faith. So far as it was shown by the evidence, Mrs. Currie's knowledge at the time of the settlement, of the amount of the estate left by her husband, was derived from a memorandum in his hand writing, which made it about \$7000.

The cause was heard on the pleadings and proofs. Such additional facts as are necessary to a correct understanding of the decision, will be found in the opinion of the court.

*S. M. Woodruff* and *A. H. Dana*, for the complainant.

*R. Mott* and *W. Inglis*, for the defendant.

BY THE COURT. DUEB, J.—The object of the bill in this case, is to set aside a release and assignment executed by Mrs. Currie, the complainant, in favor of the defendant, William Steele, of all her rights and interest in the personal estate of her deceased husband, Mungo Currie; and upon the argument, her title to this relief was placed upon the sole ground, that previous to, and at the time of the execution of the release, she was kept in ignorance of the nature and value of the assets in which she was entitled to share, and consequently in relinquishing her claims to the defendant Steele, made a greater sacrifice than, with a knowledge of the facts, which he was bound to communicate, she would have consented to bear.

In delivering our judgment, we deem it unnecessary to consider the various questions of law and of fact which were raised and discussed by the counsel upon the argument, since it is by a shorter process of reasoning that we have been enabled to arrive at a satisfactory conclusion.

It was strongly urged by the counsel for the complainant, that this cause ought to be decided upon the principles that courts of equity have uniformly and wisely applied to a settlement of accounts followed by a release, between a trustee and

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cestui que trust, and indeed between all parties standing to each other in a confidential relation ; but we are clearly of opinion, that these principles are only applicable where the rights and claims of the cestui que trust were undisputed, and where the settlement upon which a release was founded was intended, and was represented to embrace all the property to which the cestui que trust was entitled. It is true, that Wm. Steele, so long as he retained in his possession the assets of the deceased, before he obtained letters of administration, was in judgment of law a trustee for those who might ultimately appear to be entitled ; but it is not true, that the rights of Mrs. Currie as a cestui que trust, were acknowledged by him ; nor was the sum, that, for the purpose of extinguishing her claims, he agreed to pay, and she consented to receive, either stated by him, or regarded by her, as the whole amount which, had her rights been admitted or established, she would have been entitled to receive.

Her title to any share of the personal estate of the deceased, depended upon the facts whether she was his lawful wife, and whether a paper written and signed by him a few days before his death, and in which her name was not mentioned, was properly attested and published as his last will and testament ; and these facts, when the negotiation was entered into, which terminated in the release and assignment that are now sought to be impeached, had long been, and were still, the subject of a legal controversy between the parties ; nor without an amicable settlement, was there much reason to believe that this controversy would be terminated. Her object in entering into this negotiation, was to be relieved from the delay, expense and hazards of a protracted litigation, and for the sake of a speedy and final settlement, she consented to make a considerable deduction from the sum which, should her claims be established, she knew she would be entitled to receive.

The transaction was, therefore, not a settlement between a trustee and a cestui que trust, but a compromise of conflicting claims between litigant parties ; and it is by the rules that a court of equity applies in judging of the validity of such a compromise, that our determination must be governed.

Hence, the complainant, even upon the supposition that all



the facts she was entitled to know, were not disclosed to her, is not entitled to the relief she seeks merely upon the ground that the sum which she agreed to accept as the consideration for releasing her claims, was less than that proportion of her husband's estate which, as his widow, she might justly demand; for a partial sacrifice of this description is involved in every compromise of a just demand, and the very term compromise, implies its existence. To entitle her to relief, it must also appear that the voluntary sacrifice which the compromise involved, was greater than with a full knowledge of the nature and value of the assets in which she was entitled to share, she would have consented to make. In other words, it must appear that, owing to the concealment of which she complains, she has sustained a loss, the amount of which this court has now the means of ascertaining. For such a loss, if any such has been sustained, she may justly claim to be remunerated; but it is evident, that in order to ascertain its existence and extent, the sum that, in making the compromise, she was content to abate, must be deducted from the amount to which she would be entitled, should the release be set aside and a new distribution of the assets of her deceased husband be now decreed.

There can be no ground of complaint, if the moneys which the defendant, Steele, has actually paid to her from the estate of the deceased, are equal in amount, making the deduction that has been stated, to the whole sum that, upon a distribution of the assets according to the rules that the statute prescribes, she would have a right to demand. Upon this supposition, she has sustained no loss, and can be entitled to no relief.

In applying these principles, the first inquiry is, what was the sum that, in making the settlement with the defendant Steele, and for the sake of that settlement, the complainant was willing to abate from her just claims as widow of the intestate?

The allegations are, that she believed, and by a misrepresentation and concealment of material facts, was induced to believe, that the whole value of the assets that had come into the hands of Steele was \$6600, in addition to the sum of \$1000 which he had already paid her in satisfaction of the draft in her favor, which her husband had drawn shortly before his death, and

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delivered to her as a *donatio mortis causa*, and which Steele, in the name of his firm, had accepted. She also believed, and it is evident that it was so understood by her counsel and other advisers, that of this \$6600, the sum of \$4300 belonged to her as the widow of the intestate; that is, distributing the entire sum between herself and the brothers and sisters of the intestate, according to the rules that the statute prescribes. In making the compromise, and upon the condition that the defendant Steele would defray all the costs of their litigation, she consented to accept from him \$3500 in satisfaction of her claims, and this sum which she has actually received, was the consideration of the release and assignment that we are now required to annul. Hence, to free herself from an expensive and vexatious litigation, and in order to realize the funds, of which she stood in need, she submitted as she believed to a loss of \$800. Nor is it possible to doubt, that had she then possessed all the information that the answers and the evidence in this cause have disclosed, she would, from the same motives, have consented to an equal sacrifice. Hence, from any estimate of the actual loss of the complainant, this sum of \$800 must be deducted; since, in a case in which no actual fraud can be justly imputed to the defendants, and that such is the present case, the complainant's counsel candidly admitted; it would be palpably unjust to set aside the release for the purpose of restoring to her the sum that she then agreed to surrender. She may be entitled to a remuneration for any loss that her involuntary ignorance occasioned, but she has no right to consider this sum as a portion of that loss, and should it appear in the result that, deducting this sum, no loss has been sustained, she can have no title to the relief that is prayed, and the bill must be dismissed.

The total amount of the inventory that has been filed by the defendant Steele, since he obtained letters of administration, is \$8748 97. Nor is there any reason whatever for doubting that this inventory comprehends all the personal estate of the intestate, with the exception of the furniture that the complainant was allowed to retain; and it is equally clear upon the evidence, that it includes the \$1000, which, as already mentioned,

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was paid to her in satisfaction of the draft which the defendant accepted. If the release were set aside, it is this sum of \$8748 97, that it would be necessary to distribute; and crediting the complainant with the proportion that, as the widow of the intestate, she would be entitled to receive, and charging her with the sum she has actually received, and with the \$800 which, in making the compromise, she consented to abate, the result will be as follows:

Under the present statute of distribution, (2 R. S. 96, § 75, subd. 3,) she would be entitled to the gross sum of \$2000, and deducting this sum, to a moiety of the balance.

Then, \$8748 97, whole sum to be distributed.

Deduct 2000 00

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6748 97

One-half, 3374 38

Add 2000 00

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\$5374 38, whole amount to which complainant is entitled.

She has also received, and is to be charged with,—

\$1000 00 amount of draft.

3500 00 paid in compromise.

800 00 which she consented to abate.

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\$5300 00

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Leaving a balance of \$74 38, as the only sum, that upon any equitable principle we could decree to be paid to her; a balance however, far more than covered by the value of the furniture, for which, upon a new distribution of the assets, she would be compelled to account, and by the commissions to which the administrator would be entitled.

There is, however, a possible objection to the mode of computation which we have followed in arriving at this result, and this objection it will be proper to notice.

The draft of \$1000, it may be said, was a valid donation

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made to the complainant by her husband before his death, and consequently this sum ought not to be reckoned as a portion of the assets in respect to which he died intestate, but should be deducted from the sum total of the inventory, so as to confine to the residue the distribution under the statute, between the widow and the next of kin. Without stopping to inquire whether the delivery of this draft was valid as a *donatio mortis causa*, (a question as to which serious doubts might be raised,)(a) there is another, and it seems to us, a conclusive reply to the objection. It is absolutely certain, that when the draft was placed in the hands of the complainant, the intentions of the husband were, that she should have no other or larger sum from his estate than it embraced. That such were his intentions, is rendered manifest by the terms of the paper which he wrote and signed on the very day that the draft is dated, and which he doubtless believed would operate as an effectual disposition of his property ; and the circumstances of the case conclusively show, that his intentions were perfectly known to her when she received the draft. Hence, the fulfilment by her of the intentions of the donor, was a tacit condition annexed to the gift ; since, could he have foreseen that his will would be set aside, the gift, it is certain, would never have been made.

She violates this condition, when availing herself of the informalities in the execution of the will, she claims as widow a full distributive share of the estate. In preferring this claim, she induces by her own act, an entire failure of the consideration on which the gift was founded ; and certainly in a court of equity, if not of law, renders the gift a nullity. A just regard to the intentions of her husband, might have led her to confirm the disposition of his will, but when in disregard of his wishes, she elects to set them aside, there is a plain equity that she should be compelled to bring the payments made to her under the draft into the common fund for distribution, and be charged with that amount as a part of the share to which under the statute she is entitled.

It is this rule that we have followed, and it seems to us, that

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(a) See *Harris v. Clark*, 3 Comst. R. 93.

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there is no escape from the conclusion to which it has led us, namely, that the complainant has sustained no loss whatever by the settlement and release which she desires to vacate ; that is, no loss beyond that to which, from very reasonable motives, her deliberate assent was then given. So far from having been prejudiced by her alleged ignorance of the value of the estate when she executed the release, it is highly probable, that the setting it aside, instead of being a benefit to her, would be a positive injury, by compelling her, upon a more just distribution of the assets, to refund a portion of the moneys she has already received.

The bill must therefore be dismissed.

Justice to the parties requires us to add a few observations. Had there been no compromise between the parties, we have no doubt whatever that the complainant must ultimately have succeeded in establishing her claims. Without a judicial repeal of some very plain provisions of the revised statutes, the will of Currie would never have been sustained ; and that the complainant was his lawful wife, unless we impute direct perjury to many of the witnesses, cannot now be doubted. But it by no means follows, that the defendant, Steele, acted with bad faith in opposing her claims. In seeking to maintain the validity of the will, he acted under the advice of eminent counsel ; and the circumstances of the case, as they appeared immediately after the death of Currie, justified him in believing that the allegation of a marriage between him and the complainant, was a fraudulent pretence, which his duty to the next of kin of the deceased required him to resist, and, if possible, to defeat. The suspicions that at this time covered the case, may now be removed, but originally it was a case of very strong suspicion. Nor is this all that our duty requires us to say.

The very gross charges of collusion, bribery, and fraud, that the complainant has preferred in her bill against Mr. Steele, and her then solicitor and legal adviser, Mr. Mott, we are bound to say, are utterly groundless, and ought never to have been made. They are not only fully denied in their answers, but are effectually refuted by the evidence ; and for those reasons,

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they were very properly abandoned by the able counsel for the plaintiff.

Under these circumstances, could we reach the party to whose rash suspicions and rash advice, the filing of the bill and the charges it contains must be ascribed, costs would be given to the defendants. But it is evident, that the complainant has been deceived by him in whom her confidence was reposed; and in consideration of her sex, her ignorance, and her poverty, we think it a fair exercise of our discretion, in dismissing her bill, to exempt her from the usual penalty.

The bill is dismissed without costs.

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**BOREEL and others v. THE MAYOR, ALDERMEN AND COMMON-  
ALTY OF THE CITY OF NEW YORK.**

A grant of a municipal corporation, having the right to land on the shore and under the water of a river or harbor, of the land under water from high water mark, to A. in fee, reserving so much of the soil under water as was required for a street, which was to become the exterior line of the filling up of such land, and the same, as well as the wharves built out therefrom, were to be public streets and wharves; and which grant contained a covenant of the corporation, that A. and his heirs &c., fulfilling their covenants, might have and enjoy the wharfage and all the advantages of the wharves to be erected;—conveys conditionally in respect of the wharf or bulkhead made by the street, an interest, which is real property; and it is not to be considered as a mere covenant.

Such an interest is an incorporeal hereditament.

Incorporeal hereditaments, are not subject to taxation by the provisions of the revised statutes concerning the assessment and collection of taxes.

They are not *land, real estate or real property*; nor are they *chattels or personal property*; as defined in the tax law.

(Before DUEB, MASON and CAMPBELL, J. J.)

May 19, 20; June 9, 1849.

THE bill in this cause stated that the defendants, on the 1st of August, 1810, by deed under their corporate seal, granted to John Jacob Astor, now deceased, and to his heirs and assigns, two water lots, one of them, (in relation to which the controversy in this cause has arisen,) situate between King and Hamers-

ley streets, in the city of New York, and extending westerly in breadth from high water mark on the Hudson River, four hundred and twenty-eight feet, to the line established as the permanent line of West street, and in length from north to south, one hundred and fifty feet, saving and reserving however out of such water lot and soil under water, so much of the same as would be necessary to make Washington street sixty feet wide, and West street seventy feet wide; the streets to be extended and continued through the premises as the same should be directed by the corporation of the city, agreeably to a map annexed to the deed.

The deed contained a covenant by the grantee, that he, his heirs, or assigns, would build, on the requisition of the corporation, such wharves and streets on that portion of Washington and West streets which passed through the premises, as should be necessary to make them respectively of the width stipulated for, and would also keep them at all times thereafter, in good order and repair, and that the same should always be used as public wharves and streets; and also a covenant on the part of the corporation that the party of the second part, his heirs and assigns, keeping and performing the covenant &c. on his and their part to be performed, should and might at all times thereafter, have and enjoy the wharfage and benefits and advantages growing or arising from the wharves to be erected on the west end of the premises.

The bill then alleged that Mr. Astor had erected the wharf on the west end of the premises, as contemplated by the grant, and that the same had at all times since its erection, been used and occupied as a public street or wharf. That Mr. Astor had for several years past been assessed by the assessors of the eighth ward, (in which the premises are situated,) as the owner of the bulkhead, being parcel of the wharf so built by him, and taxes had been imposed on the bulkhead accordingly, and that such taxes not having been paid, the corporation had sold the bulkhead wharf or street, for the non-payment of some of the taxes, to one John L. Brower for the term of five years, and were about to give him a lease therefor, pursuant to such sale; and also that

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they intend to sell the bulkhead for other taxes which had been assessed thereon.

The bill then stated the death of Mr. Astor, and that the complainants have succeeded to his rights in the premises by devise from him, and that they are advised that the interest secured to Mr. Astor, his heirs and assigns, in or out of the wharf, was not, and is not now, the subject of taxation by the laws of the state. The bill prayed that the corporation of the city might be enjoined from granting a lease to Brown under the sale heretofore made, and from selling the bulkhead for the remaining taxes imposed thereon, and from assessing any taxes thereon in future, and for other and further relief.

To this bill the defendants demurred for want of equity.

*Willis Hall*, for the defendants, argued the following proposition :—

The bulkhead of the complainants, between King and Hammersley streets, is a *proper subject* of taxation—

1. If the fee of the land belong to them, then the bulkhead is properly taxed as *real estate*.

2. If the fee belong to the corporation, then the franchise transferred to them to take wharfages on the bulkhead, is "*a chattel*," and properly taxed as personal estate. 1 R. S. 387. (The argument of Mr. Hall is noticed in the opinion of the court.)

*Jonathan Miller*, for the complainants.

1. The fee of the land for Washington and West streets, remains in the corporation by virtue of the reservation contained in the grant.

2. West street being a public highway, of which the bulkhead is a part, neither it nor the bulkhead is the subject of taxation, in whomsoever the fees is vested.

3. If it were the subject of taxation, it should be taxed to the owner, viz., the corporation, who should pay the taxes upon it.

4. The right to receive the wharfage, &c., is not, under the provisions of the statute, the subject of taxation, in advance of the receipts of such wharfage ; because,



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a. It would be an income tax, and upon an uncertain income.  
b. Property out of which income arises, and not the income itself until realized, is the exclusive subject of taxation.

c. The owner of such property, must pay the tax upon his property, whether he use it or not. The benefit which he may derive from its occupation, cannot be taxed in advance, any more than the loss which he may sustain by its use can diminish his tax.

d. If the user by the owner cannot be taxed in advance, his grantee of the user cannot; for the user is equally valuable whether enjoyed by the owner of the land or by another, and the subject of taxation in the one case as well as the other.

5. There is no covenant, either express or implied, contained in the grant, that the grantee should pay the tax on the bulkhead.

6. There is an express covenant on the part of the grantors, that the grantee should always have and receive the wharfage.

7. The corporation are bound, therefore, to refrain from doing or permitting any act to defeat the grantee, or impede him in the collecting of such wharfage.

8. If the user of the bulkhead by the grantee personally, or by others with his permission express or implied, for a consideration fixed by the parties or established by law, be a proper subject of taxation, then it is taxable only as personal estate.

9. Taxes imposed on personal estate; or more correctly speaking, on the owner thereof, do not thereby become a specific lien on the particular personal estate, as they do in the case of real estate. And for non-payment of taxes on personal estate, no sale can be made of any property except the *goods and chattels* of the person assessed, after *distress* made of the particular goods and chattels, to be sold by virtue of a warrant issued for such purpose.

10. Although *choses in action* are made by law the subject of taxation, to be assessed upon the owner; yet they cannot be sold for non-payment of such taxes.

Such taxes are to be made by distress and sale, not of all the personal estate assessed, nor of any designated portion of the assessed personal estate, but by *distress and sale* of the *goods*

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and *chattels* generally of the person assessed, by a warrant against him for such purpose. (Laws of 1848, p. 318, 319, § 9.)

11. An execution on a judgment is to be levied of the *goods* and *chattels* of the defendant. By virtue of an execution a bond and mortgage or stocks cannot be sold. (*Denton v. Livingston*, 9 Johns. 96 ; *Ingalls v. Lloyd*, 1 Cowen, 240.)

12. If the right which the plaintiffs have, to receive the wharfage, be the subject of taxation ; it is an *incorporeal* right or thing, and consequently not the subject of distress and sale under or by virtue of a warrant to collect the taxes, any more than a bond or mortgage would be.

BY THE COURT. MASON, J.—The first question which presents itself is, What is the estate or interest which the plaintiffs have in the bulkhead or wharf?

It was not pretended on the argument, that they own the land on which it is erected. It is built on the permanent line of West street ; and West street, extending easterly from the permanent line seventy feet, was expressly excepted from the grant. The words are, "Saving and reserving nevertheless out of the several water lots and soil under water above mentioned, so much of the same as will be necessary to make Washington street sixty feet wide, and West street seventy feet wide." The title to the land then never passed out of the defendants by this conveyance, and of course they are the legal owners of the bulkhead and wharf erected thereon by Mr. Astor under the covenants in the grant.

The equivalent which Mr. Astor obtained for his expenditures, was the right to receive the fees or dues levied on vessels for the privilege of laying at the wharf and receiving and discharging their cargoes.

As to the nature of this right, the learned counsel who argued this cause were not agreed. The counsel for the plaintiffs contended that it is a matter resting in covenant only. We are of opinion however that this interest is real property, and that the part of the deed relating to it, is to be considered as a conditional grant, and not a covenant. It is as follows : "The parties of the first part for themselves and their successors, covenant with the

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said party of the second part his heirs and assigns, that the said party of the second part, his heirs and assigns, paying and performing," &c., "shall and may lawfully at all times hereafter fully and freely have, use, and enjoy, to his and their own use, all, and all manner of wharfage, benefits and advantages growing, accruing or arising by and from the wharf," &c., to be erected.

It was clearly the intention of the defendants, that Mr. Astor should have all the right to the wharfage which they themselves possessed, after he had paid the stipulated consideration by filling up the street and erecting the bulkhead, and that this right should pass to his heirs. So the parties have themselves considered it. It appears by the bill that he or the plaintiffs have always collected the wharfage, and that the defendants have endeavored to tax his right to do so, on the ground of its being real estate belonging to him; and it would therefore be unreasonable, as well as contrary to the intention of the parties, to put such a construction on the deed as should enable the defendants still to retain the legal right to collect the wharfage, and give the plaintiffs merely a right of action against them, to recover it. The objection to holding it to be a grant is, that the word "*grant*" is not used, but only the word covenant. But in many cases the law creates a good grant without express words, because it is the design of the law to render all contracts binding and effectual so far as the intention of the parties may be gathered from the deed; and such interpretation is much stronger against the grantor, because he is presumed to receive a valuable consideration for what he parts with. (Shep. Touch. 232; 2 Roll. Abr. 56.) "It never had been held necessary," said Lord Kenyon, in *Shool v. Pincke*, (5 T. R. 129,) "that the word '*grant*' should be used in a grant, it being sufficient if the intention to grant be manifested by a deed." The deed then under consideration makes a '*grant*' to Astor and his heirs, of the fees and duties payable out of the use of the wharf, while the fee of the wharf itself remains with the defendants; and this is precisely the estate or interest known as an incorporeal hereditament. "Corporeal hereditament," says Blackstone, (2 Com. 191,) "are the substance, which may be always seen, always handled. Incorporeal hereditaments are

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but a sort of accident which inhere in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely an idea and abstracted contemplation, though their effects may be frequently objects of our bodily senses ; and indeed if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing or hereditament which produced them."

This wharfage issues out of and is produced by the land, yet is separated from it. It is part of the franchise originally granted by the crown to the corporation of New York, of all the wharfage arising, and to be collected from the whole island ; (Kent's City Charter, page 87,) and by the corporation transferred, as far as this property was concerned, to Mr. Astor, without the right to the soil. Such being the nature of the interest of the plaintiff, we are of opinion that it was not reached by the assessment or sale complained of by the bill.

The assessment was on the bulkhead ; the visible, tangible substance ; and not on the invisible right to the profits issuing out of that substance ; and the sale was in accordance with the assessment. The possession under the comptroller's deed, of the visible property, would not vest the purchaser with the incorporeal or invisible right, which was not sold, or pretended to be sold. All that was sold was the fee of the bulkhead, subject to the rights of the public therein. And although it was doubtless the object and intention of the corporation, by means of the sale, to reach the interest of Mr. Astor and his representatives in the wharfage, yet as the proceedings are upon the face of them ineffectual and void for that purpose, they do not perhaps within the meaning and spirit of the late decisions on this subject, cast such a cloud upon the title of the plaintiffs, as to warrant the interference of this court to set them aside. (*Simpson v. Lord Howden*, 3 Myl. & Cr. 97, and cases there cited ; *Van Doren v. The Mayor &c. of New York*, 8 Paige, 388.)

The bill, however, distinctly raises the question whether the right to the wharfage thus granted is or is not liable to taxation under the laws of the state. That question has been argued at length before us, and it was conceded by the counsel for both

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parties, that the principal object of the suit was to obtain the decision of the court on this point. We therefore proceed to consider it.

The subject is entirely of statutory regulation, and the revised statutes define very clearly the several descriptions of property subject to taxation.

The first section of the act in relation to the assessment and collection of taxes, (1 R. S. 387,) is as follows: "All lands and all personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation subject to the exemption herein specified."

The next section declares that the term "land," as used in that chapter, "shall be construed to include the land itself, all buildings and other articles erected upon, or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils, in and under the same, except mines belonging to the state; and the terms 'real estate,' and 'real property,' whenever they occur in this chapter, shall be construed as having the same meaning as the term 'land,' thus defined."

The estate in question, being an incorporeal hereditament, or a right issuing out of the land, clearly does not fall within the definition of *lands*, contained in the foregoing sections.

Is it included in the term 'personal estate'?

The third section of the same act declares that "the terms 'personal estate' and 'personal property,' wherever they occur in this chapter, shall be construed to include all household furniture, monies, goods and *chattels*, debts due from solvent debtors whether on account, contract, bond and mortgage, public stocks, and stocks in monied corporations."

The learned counsel for the corporation contended with much earnestness, that the interest of the plaintiffs in the wharfage, was an '*incorporeal chattel*,' and therefore liable, under the definition of 'personal estate' in this section, to taxation as a chattel.

But upon referring to the passage in 2 Stephen's Com. p. 72, which was cited as authority for this application of the term, it will be seen that the author explains the term *incorporeal chattels* to mean interests arising out of personal property, as incorporeal hereditaments are interests or rights issuing out of land.

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The right in question, we have shown to be of the latter description, and to be strictly an incorporeal hereditament.

And even were the doctrine true, the law nowhere authorizes the separate assessment of different kinds of personal property, as is done with regard to real estate, and their sale for the non-payment of the tax assessed.

The individual owning personal property is assessed in respect of all his personal property, of whatever kind and wherever situated ; and payment of the whole tax thus assessed, can be enforced by distress and sale of any part. But the tax forms no specific lien on any part of the personalty, and no authority is given by law for its sale. The value of any chattel, forms part of the estimate of the personal estate, and the aggregate amount of the tax on the whole personal property of any individual, is collected out of any portion that may be within reach of the collector.

We are therefore obliged to decide that this franchise, valuable as it is, is neither land nor personal estate subject to taxation by the laws of this state ; and that, not only this particular kind of incorporeal hereditament, but all incorporeal hereditaments whatever, are by a singular omission in the statutes, exempt from contributing their just proportion to the public burthens, and must continue to be so exempt, until the legislature shall take the necessary action in the premises.

The demurrer must be overruled. The plaintiffs are entitled to a decree, declaring that the right to wharfage granted and secured to John Jacob Astor by the grant mentioned in the bill and now owned by the plaintiffs, is not by the laws of this state subject to taxation ; that the assessment of taxes upon the bulkhead mentioned in the bill, and the sales for the non-payment of such taxes, or of any of them, in so far as they sought or were intended to reach that right or interest, were null and void ; and the defendants must be perpetually enjoined from assessing such interest. And although the court will not, upon this bill, enjoin the defendants from assessing and selling to a private individual, a piece of their own land which they have dedicated to the use of the public as a public street and wharf, yet it is proper that in any conveyance which they may grant upon a sale

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of the bulkhead in this case, a clause should be inserted that the conveyance shall in no manner prejudice or affect the right of the plaintiffs to receive the wharfage as heretofore, and the decree will contain a direction to that effect.

No costs allowed to either party.

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COX v. MCBURNEY and others.

## BEEKMAN v. MCBURNEY and others.

To constitute real estate partnership property, which is purchased with partnership funds, it must be bought or used for partnership purposes.

Where land was thus purchased in the name of A. one of two partners, not intended or used for the purposes of the partnership; it was held, that T. the other partner, who survived A., took no estate or interest in it as survivor, and no interest in the same passed to his assignee in bankruptcy.

So far as T.'s money may be deemed to have gone to the purchase in A.'s name, there would be no use or trust for T.; but his then creditors could reach his proportion of it, under the statute of trusts.

An equity of redemption belonging to an intestate, does not pass to his administrator on its being converted into a surplus by foreclosure and sale.

Such surplus will not be awarded to a grantee of the mortgagor, the grant to whom was made with the intent to defraud creditors.

(Before DURE, MASON and CAMPBELL, J. J.)

June 9; June 23, 1849.

THESE were foreclosure suits, in which there was a surplus, after paying the mortgage debts and costs. The question upon its disposal, was referred to a master in the late court of chancery. The facts in the case sufficiently appear in the decision.

*T. C. T. Buckley*, for the public administrator, and the creditors of T. and A. McBurney.

*W. Mulock*, for Mrs. McBurney.

*C. Edwards*, for G. Burnham.

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BY THE COURT. CAMPBELL, J.—Exceptions were taken in these cases to the report of the master on the distribution of a surplus. It was claimed by three parties. 1st. By Isabella McBurney, as the owner of the equity of redemption. 2d. By the public administrator of the city of New York, who had taken out letters of administration upon the estate of Alexander McBurney, the mortgagor. And 3d. By Gordon Burnham, under a conveyance from the general assignee in bankruptcy, conveying the interest of Thomas McBurney, the brother and surviving partner of the firm of which the mortgagor was a member at the time of his death. The master reported, that neither of the claimants were entitled to any portion of the surplus. That the conveyance to Isabella McBurney of the equity of redemption, which was made by her son, Alexander McBurney, just previous to his death, was made without adequate consideration, and with the intent to hinder and delay creditors, and was fraudulent and void. That at the time of the death of Alexander McBurney, upon whose estate the public administrator had taken out letters, the property out of which the surplus arose, was real estate, and therefore he was not entitled to receive and distribute it. That the real estate was the individual property of Alexander McBurney at the time of his death, and, therefore, the general assignee took no estate under a decree in bankruptcy against Thomas McBurney, the brother and partner of Alexander, and no interest in the premises passed under the deed from the general assignee to Burnham.

All the parties excepted to the master's report. The premises out of which the surplus arose, were the house and lot No. 79 Greene street, in the city of New York; and were, in November, 1842, a few days previous to his death, conveyed by Alexander McBurney to his mother, Isabella McBurney, subject to the two mortgages which were foreclosed in these suits. The firm of T. & A. McBurney, of which Alexander was a member, was heavily insolvent at the time of the conveyance. It is not pretended that any consideration passed at the time, but it is alleged that Alexander McBurney was indebted to his mother, for money lent to him by her many years before; of which moneys, however, there is no account, and for the repayment of



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which there was no obligation in writing ; and the existence of such indebtedness is certainly, from the testimony, very problematical. The counsel of Mrs. McBurney did not take part in the argument, but has by permission handed to us a brief which certainly might attract the attention of the curious, but which, however brilliant as a philosophical or moral essay, has failed to convince us of the sufficiency of Mrs. McBurney's title, either in law or in equity, to the surplus moneys which are the subject matter of the controversy before us. We are constrained to say that, in our judgment, the cry of fraud upon creditors, to which the master listened, and which the counsel so much deprecated, was not raised without adequate cause, in this instance at least ; and we must confirm his report, that the conveyance was made to her without adequate consideration, and with the intent to hinder, delay, and defraud creditors ; and that it is void ; and that she is not entitled to any portion of the fund.

This surplus fund is claimed by the public administrator, under his letters of administration upon the estate of Alexander McBurney. The statute, (2 R. S. 83,) enumerates and defines the property which passes to executors and administrators, and it is very evident that equities of redemption in mortgaged premises are not included in the list.

Almost the precise case with the present arose, and was decided in the English court of chancery, and will be found in 2 Sim. & Stu. 323, (*Wright v. Rose.*) The property was mortgaged, and sold after the death of the mortgagor. The plaintiffs took out letters of administration, and then filed their bill to reach the surplus in the hands of the defendant. It did not appear on the face of the bill to whom the right of redemption belonged. A demurrer was interposed to the bill, and was allowed ; the court deciding, that if a sale take place in the life time of the mortgagor, the surplus is personal estate, but if after his death, real estate, because, in the latter case, the equity of redemption descended to the heir. We are satisfied that, upon general principles, and according to our statutory provisions, the public administrator is not entitled to the fund.

The right of Gordon Burnham to this fund was presented, and argued with ability and confidence by his counsel, but we

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are constrained to say, that in his case also, we think the report of the master correct. After the death of Alexander McBurney, Thomas McBurney for himself and as surviving partner of T. & A. McBurney, filed his petition for a discharge in bankruptcy under the provisions of the act of 1841. He was decreed a bankrupt, and among his assets which were sold by the general assignee in bankruptcy, was his interest or estate in the dwelling house and lot, No. 79 Greene street, which interest or estate for a nominal sum, was conveyed to Mr. Burnham. Successful opposition was made by the creditors of Thomas McBurney to his discharge; and his Honor, the U. S. Judge for the Southern District of New York, on a full hearing, pronounced that the house and lot, No. 79 Greene street, had been purchased with partnership funds, and was partnership property; and that Thomas McBurney having stood by and assented to the conveyance by Alexander McBurney to Mrs. McBurney, made with intent to defraud, was himself guilty of fraud upon his creditors; and for this, and other reasons, was not entitled to his discharge.

We are asked to consider this decree of the U. S. District Court as binding, and as determining the rights of Mr. Burnham to the fund. It can hardly be seriously contended that a decision thus made, where a part only of the claimants were before the court, would be binding in the present controversy. But it is, perhaps, not material to decide this question; nor whether it was competent for the counsel to read on the hearing papers in bankruptcy which were not produced and proved before the master. There is no doubt that, under the law of Congress, the power is given to the U. S. District Court, to determine by summary proceedings, questions relating to the bankrupt's property, and also the rights of creditors to its distribution. It was competent for that court to decide, that the property in question was partnership property, and that therefore Thomas McBurney, by not setting forth that fact, had been guilty of fraud, and was not entitled to his discharge. If the firm of T. & A. McBurney had gone into bankruptcy, it would have been its duty to determine whether the property in question was partnership property, or had been purchased with

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partnership funds, in order that, if belonging to the partnership assets, the proceeds should be distributed among the creditors of the firm, and not among the separate creditors of Alexander McBurney. The decree made in the U. S. Court, in the matter of Thomas McBurney, settled the question in that court, so far as Thomas McBurney was concerned, that the property in question had been purchased with partnership funds, and that Thomas McBurney had, in contemplation of bankruptcy, stood by and assented to the conveyance to his mother, and that this was a fraud upon creditors, and he was not entitled to his discharge.

“The obvious design of the Bankrupt Act of 1841,” says Judge Story, (*Ex parte Christy*, 3 Howard Rep. 312,) “was to secure a prompt and effectual administration and settlement of the estates of all bankrupts within a limited period. For this purpose, it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunal over which it could exercise no effectual control;” and for this purpose, the courts of the United States sitting in bankruptcy were clothed with most ample powers. But though the powers were ample, the exercise of such powers was necessarily confined strictly to the subject matter submitted under the act. No power was given to vest in assignees the title to property where the title never existed in the bankrupt himself; nor to preclude creditors from enforcing rights and liens upon property which existed independently of the bankrupt act. In this case, it was competent for the assignee to sell the interest of Thomas McBurney in the house and lot, 79 Greene street. That interest, we think, was merely nominal. If it were the individual property of Alexander McBurney, and so we are bound to consider it from the testimony before us, then the bankrupt had no interest in it which would pass to the assignee. If the premises were purchased with partnership funds, (and so it doubtless appeared by the testimony produced before his Honor, the U. S. District Judge,) then the title passed to Isabella McBurney under the conveyance made with the assent of Thomas; or, if that con-

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veyance were void, to the heirs at law of Alexander, subject to the claims of creditors. To constitute it partnership property, it should not only have been purchased with partnership funds, but it should have been used for partnership purposes ; and all the cases seem to contemplate this distinction. (*Crawshaw v. Maule*, 1 Swanston, 508 ; *Philip v. Philip*, 1 Mylne & Keene, 649 ; *Fereday v. Wightwick*, 1 Russell & Mylne, 45.) The premises in question, were occupied as a dwelling house, and it was not pretended that they were ever used for partnership purposes. If it had been partnership property, then Thomas McBurney having assented to the conveyance to his mother, would be bound by that conveyance, and his creditors alone could reach the property. If the conveyance were void as against him, and he, as a brother of Alexander, had been entitled to a portion of the premises, still, as his heir at law, he would take subject to the equitable lien of creditors. But again, if this property was purchased with the funds of the partnership, and the title taken by Alexander McBurney, the statute declares, that the rights and interests of the parties (1 R. S. 728, § 51,) are as follows : “ Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.” The next section provides, that such conveyances shall be presumed fraudulent as against creditors existing at the time of the conveyance, and that where a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent of their demands. The conveyance having been made to Alexander McBurney with the consent of Thomas, even if the whole purchase money had been advanced by Thomas, the absolute title would have vested in Alexander, subject only to be defeated by the creditors of Thomas existing at the time of the conveyance.

In no event, therefore, did any title pass under the assignee's sale to Burnham, which transferred only the right of Thomas McBurney.

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We think the report of the master is correct, and that neither Isabella McBurney, the public administrator, nor Gordon Burnham, are entitled to this surplus fund. It is equitable assets in this court, to be divided among the creditors of Alexander McBurney, and the separate creditors of Thomas McBurney, if he had such at the time of the conveyance; and if it shall hereafter appear that the premises were purchased with partnership funds, and if there are no separate creditors, then among the creditors of the firm of T. & A. McBurney. It may be referred to a referee, with directions that he cause notice to be given to the separate creditors of Alexander and Thomas McBurney, and also to the creditors of the firm, by publication in one or more newspapers in the city of New York for six weeks, requiring such creditors to present and prove their claims; and that he report such claims to this court, and also whether the premises were purchased with partnership funds; to the end that, on the coming in of that report, an order may be made for the just distribution of such fund among the creditors who may appear to be entitled to the same. No costs are allowed to either party.(a)

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(a) A reference was had accordingly, which resulted in the distribution of the fund among the creditors of Alexander and Thomas McBurney.

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## SELDEN v. VERMILYA and others.

In 1843, R., owing a large sum to S. and V., secured by bonds to them, severally, payable in several successive years, conveyed certain real estate and land shares to trustees, in trust to manage and sell the same as they might deem best, and apply the proceeds towards payment of the bonds and interest as they fell due. In case of a default in payment of any of the bonds, or the annual interest, the trustees, on the written request of either of the creditors, were to sell so much of the premises conveyed, at auction, on ten days notice, as would pay the amount actually due. The land shares were to be first sold, and then the lands. The surplus was to be paid over and conveyed to R. In 1846, R. executed to the trustees, with the concurrence of the creditors, a release of his residuary interest, and procured a conveyance of certain outstanding interests to them; upon which the creditors released R.'s personal liability on the bonds. The agreement thereupon executed by all the parties, provided that all the property should be offered for sale by the trustees, on reasonable notice, unless a division without sale were agreed upon without unnecessary delay. In the event of any of the parties not consenting, then a sale was to be made, under the trust deed of 1843, upon the requisition of the other parties, for the payment of the bonds held by them which were then due. The parties did not agree upon a division of the property.

*Held*, 1. That if by the transactions in October, 1846, the creditors became vested as tenants in common, with all the lands conveyed in trust in 1843, and the estate of the trustees under that conveyance, ceased; the power to sell the lands was nevertheless continued.

2. In that view, the power conferred on the trustees, by the instruments of October, 1846, being granted by the owners of lands to be exercised for their sole benefit, was therefore not a *power in trust*. It was "a simple power of attorney to convey lands in the name and for the benefit of the owner."

3. That the power to sell was not revocable by either one of the constituents, without the consent of all. The right to demand a sale was conferred on each, in consideration of his releasing R.

*Held*, further, that the effect of the instrument of October, 1846, was merely to vary and modify that of 1843, and that the lands after October, 1846, were held under a valid, express trust to sell lands for the benefit of creditors. That the power of sale extended to the liquidation of the bonds of R. then due and payable; and for the rateable benefit of all such bonds, without preference.

A partition cannot be made of land which an attorney is authorized by an irrevocable power from the tenant in common, to sell for the benefit of all the owners; without the consent of all to such partition.

So of lands conveyed to a trustee where each is entitled to require a sale of the whole for the benefit of creditors, even after the residuary interest has been extinguished.

(Before DUER, MASON and CAMPBELL, J. J.)

May 12, 13; June 23, 1849

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THIS cause came on to be heard on the bill, answers and replications. The bill was filed February 25, 1847, by David Selden, against Thomas Vermilya, William Curtis Noyes, Richard H. Ogden, John J. Boyd, Alexander H. Dana, the executors of Samuel Stevens, Samuel Lent and several other parties. The bill was filed in behalf of all interested, who might choose to come in and contribute. All the defendants above named put in answers. The facts material to the decision of the cause in this court, (besides some which will be found in the opinion,) were as follows :

On the second day of October 1838, Benjamin W. Rogers, of the city of New York, for the consideration of \$38,000, advanced to him in certificates of deposit or trust, bearing five per cent. interest, conveyed in fee to The Farmers Loan and Trust Company, divers parcels of land in the county of Livingston, in this state. That corporation at the same time executed to Rogers an agreement and declaration of trust, to the effect, that out of the advance, the liens on the property were to be first paid ; the corporation were to sell the premises when requested by Rogers, and account to him for the proceeds, after reimbursing to itself the sum advanced, with interest at seven per cent. The company subsequently sold and conveyed some portions of the premises and received the proceeds.

On the third day of October, 1843, a deed of trust was executed by and between Rogers of the first part, Noyes and Ogden of the second part, and Vermilya and the complainant, Selden, of the third part. The deed recited that Rogers, on a final settlement, was indebted to Vermilya in \$40,023 97, for which he had made to V. one note of \$5000, one of \$3560, (including a year's interest,) and three bonds for \$3500 each, four bonds for \$4500 each, and one bond for \$3523 97, all bearing annual interest. The notes were payable August 17th, 1844, the bonds fell due August 17th of each succeeding year to 1848. The deed further recited that Rogers was indebted \$40,023 98 to the complainant, for which he had given five bonds, with interest annually, falling due August 17th of each year from 1844 to 1848 inclusive. That Rogers was the owner of one hundred and thirty-eight shares in the Apalachicola Land Company ; of a residuary interest in the

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lands conveyed to The Farmers Loan Company, as before stated ; of certain undivided interests in lands in several Indian reservations in Western New York, and of certain tracts allotted to him on a division of such lands ; and that Rogers, to secure the payment of those debts, had agreed to convey all those properties to Noyes and Ogden in trust. The deed thereupon conveyed the same accordingly to Noyes & Ogden as joint tenants, subject to various charges and liens. The trusts declared, were as follows :

“ That they, the said parties of the second part, do take and receive conveyances in severalty, of and for such lands in their own names, or in the name of the survivor of them, and thereupon manage and improve, sell or dispose of the same, or such parts and parcels, in such manner and at such times, and upon such terms and conditions as they, the said parties of the second part, or the survivor of them, shall think most beneficial, and to take and receive the moneys arising from such sales and conveyances, or bonds and mortgages, or other securities for the same, and to apply said moneys towards the payment of such of the notes and bonds hereby secured as shall have already become due and be remaining unpaid in whole or in part, or which shall become due on the seventeenth day of August, and after the receipt of such moneys.

And it is hereby declared, that the indenture and the conveyance herein as aforesaid to the parties of the second part, is made upon the trusts and for the uses, intents and purposes following : that is to say, upon trusts,

That whenever, and as often as default shall be made for the period of thirty days in the payment of any or either of the several sums of money mentioned in the said promissory notes, or in the conditions of the several bonds, or in the payment of the interest on the said sums, or any or either of them, at any of the times when, according to the tenor and effect of the said bonds, the same shall fall due, then they, the said parties of the second part, if thereto required in writing by the said Thomas Vermilya or David Selden, shall sell at public auction in the city of New York, (at least ten days notice thereof being previously



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given by advertisement in a newspaper published in the said city, which notice may be given before the expiration of the said period of thirty days,) so many of the said Apalachicola Land Company shares as may be necessary to pay such bond or bonds, note or notes so being due and unpaid, and the interest which may then be due on any of the said bonds or notes, and thereupon grant and convey such shares to the purchaser or purchasers thereof in fee simple, and out of the proceeds arising from such sales, to take up, pay and discharge such bond or bonds, note or notes, and interest, and pay and discharge the costs and charges of every such advertisement, sale and conveyance, and all such other charges and expenses as the said trustees shall or may incur, or be subjected to, in or about the execution of the trusts hereby created.

And if it shall happen that, upon any such default and sale, the proceeds of the whole of the said Apalachicola Land Company's shares shall prove insufficient to enable the said trustees to pay and discharge in full such bond or bonds, note or notes, and interest, with the costs, charges and expenses above mentioned, then the said parties of the second part shall proceed to sell by public auction in the city of New York, on six week's previous notice thereof, to be given by advertisement in a newspaper published in the said city, so much of the other trust premises as may be necessary to make good the deficiency, and to grant and convey the same to the purchaser or purchasers thereof, as fully and absolutely as the same were held by the said Benjamin W. Rogers immediately before the execution of these presents. And when the said bonds and notes, so made and executed by the said Benjamin W. Rogers to the said Thomas Vermilya and David Selden respectively, with the interest thereon, shall have been fully paid, then, after reimbursing and retaining out of the avails and proceeds of the said trust premises all the expenses, disbursements and charges of the said parties of the second part, in or about the execution of the trust hereby created, the said parties of the second part, or the survivor of them, are to account for and pay over to the said Benjamin W. Rogers, his executors, administrators and assign, all the residue and surplus

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of such avails and proceeds, and to grant and release to him, his heirs, executors, administrators and assigns, all the residue and remainder of the shares in the Apalachicola Land Company's lands, and other the trust premises hereby granted and assigned, or intended so to be."

The trust deed then provided for a change of trustees in case of death or resignation, &c., for their compensation, and that Rogers should be entitled to a return of three shares of the Apalachicola Land Company for every \$1000 paid by him on account of the principal debt. The residuary interest in the lands in Livingston county, was not to be sold without Rogers consent, until all the other premises had been exhausted. On the 14th of October, 1846, an agreement under seal was executed between Rogers, the complainant, Vermilya and several holders of Rogers bonds, which Vermilya had assigned, viz.: Messrs. Boyd, Dana, Lent and S. Stevens, executors ; in the following words :

"Whereas, pursuant to the terms of a trust deed, bearing date the 3d day of October, 1843, whereby certain property was conveyed by B. W. Rogers to William Curtis Noyes and Richard H. Ogden, in trust, to pay certain bonds and notes, therein specified, to Thomas Vermilya and David Selden, a requisition has been made by J. J. Boyd, the holder of a part of the said securities, originally belonging to the said Vermilya, for a sale of so much of the trust property as will be necessary to pay and satisfy the same ; and whereas a sale has accordingly been advertised, for the 14th inst., of 138 shares of the Apalachicola Land Company stock, it is deemed, for the advantage of the other parties interested, that an amicable arrangement should be made for the final settlement of all claims existing upon the said property :

It is agreed that the said Rogers shall release to the trustees aforesaid all his residuary interest in the property held by them in trust, for the benefit of the parties holding said bonds and notes ; and that, upon said conveyance being made, he shall be discharged from all further claim on account of said indebtedness, and the trust fund shall be accepted as a satisfaction of the same, and the said bonds and notes be surrendered to the said Rogers or otherwise cancelled.

And it is further agreed, for the purpose of avoiding sacrifice

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by a forced sale, at the instance of one or more of the parties interested, and in order to make a proper settlement between all interested, that the sale of the Apalachicola shares, advertised as aforesaid, be countermanded, and that arrangement be immediately made for the disposition of the whole trust property, that the same shall be offered for sale by the trustees, unless an amicable division without sale shall be sooner agreed upon without unnecessary delay, upon a reasonable advertisement of the time and place, and under such conditions as will conduce to bring about a sale to the greatest advantage of the parties interested, upon which sale any of the parties interested may become purchasers.

And in the event of any of the parties not consenting hereto, then a sale shall be made under the trust deed, upon the requisition of the other parties subscribers hereto, for payment of the bonds and notes held by them, which are now due. It is further agreed, that the charges incident hereto, including the fee of the counsel of the parties upon the settlement with The Farmers Loan and Trust Company, which is fixed at \$1000, be paid out of the first proceeds of sale.

This agreement to be binding upon such parties as shall sign the same."

On the 28th November, 1846, Rogers released and conveyed to the trustees, all his right to the property held by them, pursuant to this agreement.

On the 8th of February, 1847, this agreement was affirmed and ratified by Vermilya as trustee for the infant children of T. S. Christophers owning part of Rogers bond debt.

The complainant claimed that it was part of this arrangement, that the parties interested in the Noyes and Ogden trust, should release to The Farmers Loan and Trust Company, certain portions of the trust premises, which that company was to take in full of their claim against Rogers and were to release and convey to the trustees other portions of the trust premises absolutely, which had been conveyed by Rogers to the company. The defendants claimed that the arrangement between these parties and the company, was distinct and subsequent.

The bill stated that it was not intended by any of the parties

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who signed the foregoing instrument, to provide for a sale by the trustees of the trust estate, and it was not agreed or understood that they should sell, nor to stipulate or agree to such sale. The sole view was to discharge Rogers from his personal liability, on his releasing his residuary interest, and to enable the persons entitled, to divide the property amicably without a sale by the trustees. The agreement was prepared by one of the defendants who was the counsel therein named, and of the complainant, and who had an interest in effecting a sale. The complainant relying on him, did not particularly observe the clause in it respecting a sale, and supposed the instrument had been drawn to express the intent of the parties, until he recently discovered it does not; and he insists that the clause as to a sale ought never to have been inserted, and the instrument should be read and construed as if correctly drafted, and as if the clause were omitted.

All this was denied by the answers, which insisted that a sale was the declared and great object of the agreement, and the counsel in question denied that he acted at all for the complainant in the matter.

On the 5th of February, 1847, The Farmers Loan and Trust Company executed to Noyes and Ogden, as such trustees, a release and conveyance of certain portions of the lands mentioned in the deed and in the agreement and declaration of trust, dated October 2d, 1838, situate in the county of Livingston.

On the same 5th of February, 1847, an instrument under seal was executed, between Rogers, the complainant, Vermilya, the respective defendants as owners of bonds and notes of Rogers so transferred to them by Vermilya, and the trustees, Noyes and Ogden. This instrument recited the several previous conveyances and trust deeds, the ownership of Rogers's bonds and notes, the agreement of October 14, 1846, to discharge Rogers, and his conveyance accordingly, Nov. 28, 1846; that The Farmers Loan and Trust Company had agreed with the parties to settle and put an end to Rogers's trust with them, by a division with those parties of the lands conveyed by R. to the company, and by conveying to their trustees, Noyes and

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Ogden, certain specified portions; and that the company had made a conveyance thereof accordingly. The instrument thereupon released and confirmed to the company the residue of the lands embraced in Rogers's deed to the company, and discharged the trust founded thereon.

The company, by an instrument dated January 30, 1847, fully released Rogers from his personal liability. The complainant and Vermilya, on the 4th of February, 1847, released Rogers from all his liability on the bonds and notes.

The conveyance from Rogers to the trustees, dated November 28, 1847, recited briefly the trust and power in the deed to them in 1843, and that the creditors had agreed to take R.'s release, &c., to the trustees for their use and benefit, of all his interest in the property, and that he should thereupon be discharged from all further claim on account of such indebtedness. It then released and conveyed the lands and land shares to the trustees.

The bill of complaint insisted that the defendants, other than Vermilya, had no interest in the trust property; but merely a personal claim against Rogers. Also, that their debts had been paid. Nevertheless, they claimed a right and interest, and had called on the trustees to sell the premises; and the trustees had thereupon advertised the Apalachicola land stock, and the lands in the Buffalo and Tonawanda reservations, to be sold at auction on the 25th of February, 1847. That a sale would seriously prejudice the complainant's interests. The Apalachicola stock was not saleable, from various causes, except at a great sacrifice, &c., &c.

The complainant claimed to be seised in fee of nearly three fourths (undivided) of the lands held by the trustees; and the absolute owner of a relative proportion of the Apalachicola land shares. The bill prayed for a partition and division thereof; and for an injunction against any sale of the same by the trustees.

*P. Y. Cutler, and George Wood, for the complainant.*

*W. H. Leonard, and A. C. Bradley, for the defendants.*

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BY THE COURT. DUEB, J.—This cause has been heard upon the bill, answers and replications, and upon a motion to refer the cause to take proofs and such accounts as may be requisite.

The bill seeks a partition of certain lands, partly in this state and partly in Florida, which Benjamin W. Rogers, in October, 1843, conveyed to William Curtis Noyes and Richard H. Ogden in trust, to satisfy out of the proceeds of a sale, certain debts amounting to more than \$80,000, then owing by Rogers in equal portions to the complainant Selden, and to the defendant Vermilya. The validity of this conveyance as an express trust "to sell lands for the benefit of creditors," was not questioned by any of the counsel upon the argument, and will therefore be assumed by us in the opinion that we shall proceed to deliver, but what is thus assumed, we are not to be understood as deciding.

Upon incidental questions, involving in a measure the merits of the controversy, that have arisen in the progress of the cause, opinions have been delivered by the late chancellor, by Mr. Justice Edmonds, by the supreme court, and by the court of appeals, but to none of these opinions, except that of the court of appeals, will it be necessary to advert.

The court of appeals in affirming the decree of the chancellor, dismissing the bill as to Benjamin W. Rogers, who was originally made a defendant, placed their decision upon the sole ground, that Rogers had no interest whatever in the subject of the controversy, and had therefore been improperly made a party to the suit. They held, in direct opposition to the opinion of the chancellor, although they affirmed his decree, that Rogers, by the conveyance and release executed by him in November, 1846, to the trustees, Noyes and Ogden, had divested himself of all his right, title and interest in the trust property; and to this extent, therefore, the operation in law of the November deed must be considered as settled. But the court of appeals have not decided, nor with any propriety, could they have decided, whether the title with which Rogers parted, became vested in the trustees to whom the conveyance was directly made, or in the holders of the bonds and notes, the payment of which, the

original trust deed was meant to secure ; in other words, it has not been decided whether the title to the lands of which the partition is now sought, is vested in the trustees as joint tenants, or in the parties before us, excluding the trustees, as legal or equitable tenants in common.

Had we the right to construe the release of Rogers to the trustees, and the subsequent deed and release to the same trustees, executed by The Farmers Loan and Trust Company, without any reference to the terms of the agreement between the parties to this suit and B. W. Rogers of October 14th, 1846, we should perhaps assent to the conclusion, that in judgment of law these conveyances operated as an immediate and absolute transfer to the complainant and defendants, with the exception of the trustees, of all the title and interest of Rogers, to the lands which they respectively embraced ; that is, we should give to these deeds the same construction, as if they had been made to the parties before us, directly and by name, and not to nominal trustees, for their use and benefit. Nor upon this supposition, could we have any difficulty in decreeing a partition, if not to the full extent that the bill requires, yet of the greater part of the lands to which it refers. It is true, that upon this supposition, the parties before us have only an equitable title to all the lands, except those in Livingston County, but that a partition may be decreed between equitable owners, even when those in whom the legal title is vested are not before the court, the case of *Coze v. Smith*, (4 Johns. Ch. R. 276,) without referring to other authorities, has definitively settled.

We are, however, clear in the opinion, that in construing the subsequent releases to the trustees, we have no right to reject from our consideration the previous agreement of the parties. The releases were founded upon this agreement, and were necessary and were designed to carry it into full effect. They are all parts of an entire transaction. In judgment of law, they are one instrument, and it is by reading them as such, that the intention of the parties which we are bound to effectuate must be collected. Speaking in technical language, the agreement, which is under seal, may be regarded as a deed, leading and declaring



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the uses of the subsequent conveyances, and by a necessary consequence, controlling their interpretation.

In our view, therefore, of the present controversy, it turns entirely upon the true interpretation of the agreement of Oct. 14th, 1846, and upon the effect of that interpretation upon the construction of the subsequent conveyances and releases, and the questions that arise and are necessary to be considered and determined, are ;

*First.*—Whether admitting, that the parties before us, with the exception of the trustees, are the legal or equitable owners of the lands in question, a power of sale is not vested in Noyes and Ogden, which as irrevocable, unless by the consent of all the parties, is an effectual bar to a partition ; and,

*Second.*—Whether the effect of the agreement and of the subsequent releases, was to vacate and annul, or only to vary and modify the trusts, created by the deed of October 1843, leaving the title to the lands, and the power to sell them, still subsisting in the trustees.

We have no hesitation in saying that the October agreement either grants to Noyes and Ogden a power to sell the lands to which it relates, or recognises and confirms a similar power as then existing ; and it is equally clear, nor has it been denied, that if the power thus granted or confirmed, is now valid and subsisting, we can have no authority to divide the lands to which it relates. If the power exists, we have no right, at least upon a bill framed like the present, to prevent or restrain its execution.

The bill distinctly admits that a power to sell is contained in the agreement, but alleges that it was inserted through fraud or mistake, and ought therefore to be expunged. These allegations in the bill cannot however be regarded. They are not only pointedly denied by the answers, but are clearly disproved, since the statements in the answers, as they are responsive to the bill, and have not been contradicted by proof, must be taken as true. The agreement must be construed as it stands, and we can only deduce the intentions of the parties from the language it employs.

The bill, as we read and understand it, does not deny the



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power of the trustees to sell the lands, upon any other ground than that which has been stated, and it may therefore be doubted whether any other could with propriety have been taken by the counsel for the complainant upon the argument. But we shall not permit a technical objection, which the silence of the defendants counsel appears to have waived, to prevent us from considering the cause upon its merits, and upon all the grounds that were so fully and ably stated and discussed by the counsel.

It was insisted by the complainant's counsel, that the power to sell, as expressed in the agreement, is not immediate and absolute, but that its exercise is made to depend upon a contingency that has not occurred, and from its nature cannot be expected to arise. The parties it was said, so far from contemplating an immediate sale, intended that no sale whatever should be made, unless an equitable division of the property was found to be impracticable. It was fully understood between them, (such was the argument,) that this equitable division should be made, and hence, the partition which the parties have failed to make, this court may now decree, in entire conformity, if not to the words, yet to the intent and spirit of their agreement. We confess that our first impressions were favorable to this construction of the agreement, but upon further reflection, we became satisfied that these impressions were erroneous, and that our duty required us to reject the interpretation they would have led us to adopt. The positive terms of the agreement have forced us to reject it. These plainly require the consent of each party in interest as necessary, not to authorise, but to prevent a sale. The language is clear and unambiguous, that if any one of the parties shall not consent to a division of the property, the trustees shall proceed to a sale. The defendants have not consented to a division, and we have no right to inquire into the grounds upon which their necessary consent has been, and is now withheld. We cannot take from them the discretion which the agreement gives, nor control them in its exercise. As they insist upon a sale by the trustees, the only question, that we have a right to consider, is, whether the requisite power has been vested in the trustees and now exists.

It was contended by the counsel for the defendants, that the

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requisite power was originally vested in the trustees and now exists, as a power, in trust, and consequently that under the provisions of the revised statutes, it is irrevocable and imperative. The defence it is true was not rested exclusively upon this ground, but it was evidently that which was chiefly relied on, and to the examination of the questions which it involves, the efforts of the counsel upon both sides were mainly directed.

It is with reluctance that we dissent from the opinion affirming the validity of the power, as a power in trust, which Mr. Justice Edmonds has delivered, but after an attentive consideration of all the arguments that have been urged in support of that opinion, we have found ourselves unable to adopt it. It is indeed certain, that the effect of the October agreement was to vest a power of sale in the trustees, Noyes and Ogden, but if that power may now be exercised, in opposition to the wishes of the complainant, if it is now to be considered as a power that he is not at liberty to revoke, it is upon other grounds than by qualifying it as a power in trust, that the decision must be placed. We lay no stress upon the objection that the power is not granted in the form that the statute requires, that is, by "a suitable clause in the conveyance of some estate in the lands to which it relates." (1 R. S. 735, § 106.) We have already stated that the October agreement is a constituent part of an entire transaction, that it must be read in connection with the subsequent conveyances, so as to render the whole a single, though complex instrument containing various grants, covenants and releases. We construe the power precisely as we should have done, had the agreement by which it is granted, been incorporated in the November deed, from Rogers to the trustees, and that deed had been executed by all the parties to the agreement. Thus construed, the objection as to the form of the grant ceases to apply. Nor upon reflection, do we attach any importance to the suggestion that was thrown out by the court upon the argument, viz., that the provisions of the revised statutes in relation to uses and trusts and trust powers, refer exclusively to dispositions of the legal estate, and consequently have no application to the equitable interest, which is all that the parties before us can be said to possess, in the greater part of the lands that the power embraces. It is true that these

statutory provisions refer exclusively, in their primary intent, to dispositions of the legal estate, but the words, especially in the article upon powers, are broad enough to embrace equitable interests, and were they less comprehensive than they are, a court of equity, in judging of the validity of trusts and trust powers, relating solely to equitable interests, ought doubtless to be governed by the analogy of the law, and must therefore follow the rules, *mutatis mutandis*, that the statute prescribes. It is a case to which the sound maxim that equity follows the law emphatically applies.

The next objection that we shall state to considering the power as a power in trust, is that which we are forced to regard as decisive and unanswerable. It is that the power as it now exists, is to be exercised for the sole benefit of the owners of the land by whom it is granted. Not only therefore is it not subject to the provisions of the revised statutes in relation to trust powers, looking to the intent of those provisions, and to the cases to which alone they were meant to apply, but by express words it is excepted from their operation. (1 R. S. 738, § 134.)

We shall enter into no labored argument to show that the power, as it is now alleged to exist, cannot be referred to its original creation by B. W. Rogers, in the trust deed of 1843, but that its true, and only source and origin, must be found in the agreement of the parties in October, 1846. When the whole title and interest of Rogers became vested in the parties before us as tenants in common, and it is upon the supposition that they are so vested that we are now considering the case, the estate of the trustees under the original trust ceased to exist, and with it their power to sell the lands, which had been granted, and existed only as an incident to their estate, also, and of necessity ceased. It fell with the title to which, by the terms of its creation, it was inseparably attached. Nor could it then have been revived or continued in force by any act of Rogers, without the consent of those who then became the owners of the land.

To revive its existence, a new grant from the owners was indispensable, and had not this grant been contained in the agreement, there would have been no pretence for saying that the

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power now exists. Strike from the agreement the clauses that relate to the power, and it is wholly gone.

We do not understand that the counsel for the defendants denied the position that the power, as now claimed, was granted by the agreement of 1846. It is, however, a necessary consequence of the truth of this position that the power was granted by the owners of the lands, to be exercised for their sole benefit. It is, therefore, not a trust power, but in the language of the statute, "a simple power of attorney, to convey lands in the name and for the benefit of the owner," that is, a power to which it is expressly declared that the provisions of the statute shall not extend. It is true, that the form of the instrument by which the trustees are converted into the attorneys in fact of the parties interested, is unusual, but if the intent is apparent, the form is immaterial. We have indeed been told that the agreement only contains a covenant that the trustees shall sell, but we are clearly of opinion that the clause in question is more than a covenant. It was meant to be, and therefore is, a grant of necessary authority, just as effectual as if the parties had executed and delivered to the trustees a power of attorney to sell and convey in the ordinary form.

The next inquiry is whether the power of the trustees to sell as attorneys, has been or can be revoked.

As a general rule, a mere power of attorney may be revoked by the grantor, at any time previous to its actual execution ; but when several tenants in common, by their joint act, constitute an attorney to sell the lands in which they are interested for their common benefit, and to distribute the proceeds among them in proportion to their respective interests ; it is not to be doubted, that they may, by an agreement founded on a sufficient consideration, render the power of the attorney irrevocable, otherwise than by the joint consent and act of all who unite in its creation ; and if such is the character of the power in the present case, and such the effect of the agreement of the parties, the bar which it creates to a partition is just as insuperable, as if it had been raised by a power in trust. It is of no consequence how the power is named or classified ; if it exists, may now be exercised, and without the consent of all the defendants cannot be revoked, it pre-

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cludes us from granting to the complainant the relief that he solicits.

What then upon this question is the true construction of the agreement? Its terms are such as to leave no room for a reasonable doubt as to the actual intentions of the parties. They certainly intended that the power given to the trustees should not be revoked, unless with the consent of all who were interested in its execution. They declare that if any one of the parties shall not consent to a different arrangement, a sale shall be made by the trustees under the trust deed, upon the requisition of the other parties subscribing to the agreement, for the payment of the bonds and notes then due. It must be observed that the trustees are to sell under the original trust deed, which can only mean according to the terms of that deed, and in the mode and upon the conditions that it prescribes. No other interpretation can be given to the words "under the trust deed," and we certainly have no right to reject them as unmeaning or superfluous.

It is unnecessary to recite at large, the terms and conditions of the trust deed. It is sufficient to say, that they rendered it the duty of the trustees to sell, if necessary, all the property that the trust embraced, upon the requisition in writing, either of the defendant Vermilya, or of the complainant Selden, after any one of the bonds or notes held by them respectively, should become due, and for a specified period remain unpaid. The right to require a sale thus given to Vermilya and Selden was, in its nature, individual and separate, and as it was to be exercised by each in his own discretion, neither could prevent or forbid its exercise by the other. Hence, the similar authority given to the subscribers to the agreement, the holders of the bonds and notes then due, must receive the same interpretation; it vests in each of them the same right to demand and enforce a sale, that was originally vested in Vermilya and Selden, and it equally excludes the supposition that the exercise of this right could be prevented or forbidden by the separate action of any one of them. It therefore excludes the supposition that the power to sell then given to the trustees, could be otherwise revoked than by the joint act of all by whom it was jointly cre-

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ated, since the supposition of a right in each to require, and in each to prohibit a sale, would be a manifest absurdity. The co-existence of rights thus conflicting, is a logical contradiction, and a legal impossibility.

Still, however, the question remains to be considered, whether the agreement of the parties to render the power to sell irrevocable in the sense that has been explained, was founded on a sufficient consideration? We might, perhaps, content ourselves with saying, that as the agreement is under seal, the law implies a valid consideration, or, at least, casts upon the complainant the burden of disproving its existence. But it is needless to resort to this argument, since we are satisfied that a sufficient consideration appears upon the face of the agreement.

We do not, however, rely upon the consideration that was alone stated by the defendants counsel, and upon which Mr. Justice Edmonds, in dissolving the injunction, seems to have rested his decision, viz. : that some of the defendants who were assignees of Vermilya, by requiring the trustees to sell, had entitled themselves to the satisfaction of their claims, prior to any payment to be made to the complainant, and that by the terms of the agreement, this preference in the order of payment, was wholly relinquished. We are satisfied, that the preference as claimed never existed, and that the supposition of its existence, is founded upon an erroneous interpretation of the trust deed. The trustees when required to sell, were not bound to apply the proceeds of the sale to the satisfaction only of the claims of the creditors upon whose requisition they acted, but to the payment of all the bonds and notes then remaining due and unpaid, and of the unpaid interest upon such as had not then attained their maturity. Hence, had the sale contemplated and required in 1846, been actually made, the complainant would have had an immediate right to more than a moiety of the proceeds, and his rights in this respect were in no degree altered or enlarged by the agreement that prevented the sale. It is true, that the holders of all the bonds and notes that at the date of the agreement were due and unpaid, were entitled to a preference in the order of payment over the bonds which were to fall due in 1847 and 1848. They had a prior lien upon the whole of the trust

property for the satisfaction of their debts ; but so far from relinquishing this lien, they were careful to retain it, an important fact that hitherto has by no means received the attention that it will be found to deserve. A sufficient consideration, however, rejecting that which has been stated, for all the stipulations contained in the agreement of 1846, is to be found in the discharge of the debtor, B. W. Rogers, from all personal liability. The agreement must be construed as entire. We are bound to consider all its provisions and stipulations as connected with and dependent upon each other, and have therefore no right to say that any one of the defendants would have consented to a sacrifice of his own rights by a release of the debtor, had not the power of the trustees to sell the property under the trust deed, been preserved, and continued in force. Such would be our construction of the agreement looking only to its terms, but it is proper to add, that several of the defendants have expressly sworn, that had not the clauses in relation to a sale by the trustees been inserted in the agreement, their consent to its execution would never have been given.

We have said all that we deem it necessary to say upon this branch of the case, and our conclusions are, that admitting it to be true that the trustees, Noyes and Ogden, have neither a trust estate nor a trust power, yet a valid power to sell the property now sought to be divided, was vested in them by the agreement in October, 1846, and by the terms of that agreement was made irrevocable, unless with the consent of all the parties interested in its execution ; and, consequently, that a court of equity, in the rightful exercise of its jurisdiction, cannot prevent the exercise of this power, and, in effect, annul the agreement by which it was created. It cannot therefore decree a partition.

The reasons that have been given are sufficient to explain, and as we conceive, justify our decision ; but there is another aspect in which the case may justly be viewed, and other grounds upon which our decision may, with entire propriety, be rested, and in justice to the parties and ourselves, ought to be rested. Hitherto it has been assumed, that the parties before us, excluding the trustees, have become the owners, legal or



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equitable, of the trust property, and that the only obstacle to a partition, is that which their own agreement has created ; but we are satisfied that this assumption is wholly gratuitous, and in reality is inconsistent with a just interpretation of the acts and intention of the parties. Our conviction is, that the whole title, legal and equitable, of Rogers, is now vested in the trustees as such, and that their estate, looking to the purposes for which it was created, and still exists, is valid as an express trust, under the provisions of the revised statutes. There are numerous topics that might probably be urged in support and illustration of this construction of the agreement of October, 1846, and of the conveyances and releases, which, in pursuance of that agreement, were subsequently executed ; but omitting the larger portion of these topics, we shall attempt to exhibit the argument in a condensed form, believing that the observations that we shall make, will be amply sufficient to vindicate the conclusion at which we have arrived.

The positions upon which the complainant's counsel relied, and which they developed and enforced with their usual ability and learning, will be stated nearly in the language, and certainly with no variation from the meaning, of their points. They are, that by the release of Rogers from his personal liability, the surrender of the bonds and notes, for the payment of which the original trust was created, and the acceptance by the creditors, the cestui que trusts, of the trust fund in satisfaction of their debts, the purposes for which the original trust had been created wholly ceased, and with it the estate of the trustees, Noyes and Ogden, also ceased, and that the parties who thus accepted the estate in satisfaction of their demands, became therefore legally, as well as equitably, entitled to the lands and property in the respective proportions of their several debts, that were thus extinguished.

In considering these positions, we begin with observing, that in order to sustain them, the learned counsel were compelled to assume, that the sale contemplated by the October agreement, was to be made for the common and equal benefit, in proportion to their respective demands, of the holders of all the bonds and notes, for the security and payment of which the original



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trust was created, so that the holders of the bonds that had not then reached their maturity, but were to become due in 1847 and 1848, in the event of a sale, were to be entitled to share in the distribution of the proceeds, in proportion to their demands, whatever the amount of the proceeds might be. Should the proceeds exceed the amount of all the debts, they were to share proportionably in the gain, and in case of a deficiency, were to bear only a proportion of the loss. It was not denied by the defendants counsel, that this was the true construction of the agreement, and such was our own understanding throughout the argument; but were this the case, the positions of the complainant's counsel, that by force of the agreement and of the instruments by which it was executed, the estate of the trustees wholly ceased, and those entitled to share in the proceeds of a sale, became in judgment of law the owners of the land, would probably have admitted of no dispute, and certainly of no reply. A trust to sell lands for the purpose of distributing the whole proceeds, whether in equal or unequal proportions, among different persons, it is evident, cannot be referred to any of the classes of the express trusts, that are alone authorized by the revised statutes. Whatever may have been the original character of those for whose benefit such a trust is created, it is certainly not a trust for the benefit of creditors, since such a trust necessarily implies a residuary or reversionary interest in the person by whom it is created. When the debts are satisfied, it is to him or his representatives, that unsold lands must revert; to him or his representatives, that surplus moneys arising from a sale must belong. Nor when there is no distinction in the order of payment, can the trust be sustained, as a trust for the purpose of satisfying a charge, for every charge is a definite sum, and equally with a debt implies a limited interest in the person in whose favor it is created. When a trust is created for a purpose not authorized by the revised statutes, no estate legal or equitable, vests in the trustees, and consequently the title that is intended to be conveyed, must either remain in the person creating the trust, or must pass to the cestui que trusts, who are its objects. In the present case, however, it has been decided that the title, legal and equitable, of Rogers, the origi-

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nal grantor, is wholly extinguished, and it is a necessary consequence of this decision, that if his title is not now vested in the trustees, it must have passed to those for whose benefit the trust was created. Upon the supposition, therefore, that the estate of the trustees cannot now be supported as an express trust, the position of the complainant's counsel, that the parties before us, with the exception of the trustees, are legal or equitable tenants in common, would be fully established.

We have said that the learned counsel for the complainant were forced to assume, that the construction of the agreement upon which they insisted, is that which its terms manifestly imply. Our meaning is, that had the counsel admitted that in making an application of the moneys to arise from a sale, the rights of the bond holders under the agreement were to be substantially the same as under the trust deed, their argument would have failed in its very foundation, since it could no longer have been said that the purposes for which the original trust was created had ceased to exist; or if, upon technical grounds, this was still asserted, it could not have been denied that the trust estate was revived, and continued in force for purposes just as lawful as those for which it was originally created. If the true interpretation of the agreement is, that in the event of a sale, any portion of the debts, for example, the bonds and notes actually due at the date of the agreement, will be entitled to a prior satisfaction, the debts thus preferred are a lien or incumbrance upon the whole trust property, and consequently, if the whole shall be sold, the whole proceeds, if necessary, must be applied to their satisfaction. Hence, the holders of the postponed debts, (and it must be remembered that owing to the assignments made by Vermilya, it is by different persons that the sums originally due to him, are now claimed,) have only an eventual and residuary interest in the lands, precisely analogous to that of Rogers himself, under the original trust; and upon this supposition, it is certain that there are no parties before the court, between whom, as tenants in common, having an immediate title to the possession of the lands, a partition can be made. It may be true that the holders of the preferred debts, by releasing Rogers from his personal liability, have ceased to be his

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creditors, and that the sums which they are to receive can no longer, with strict propriety, be denominated debts, but if they have ceased to be debts, we are unable to perceive or imagine upon what grounds it can be denied that they are subsisting charges upon the lands, or that the power to the trustees to sell the lands, is valid as an express trust under the same section of the revised statutes, by which the original trust is deemed to have been authorized. If no longer a trust for the benefit of creditors, it is "a trust to sell lands, for the purpose of satisfying a charge thereon." (1 R. S. 728, § 65, subd. 2.) We see no necessity, however, for adopting the narrow and technical interpretation that would wholly extinguish the original trust. We believe that the effect of the agreement of the parties, and their actual intention, was to continue in force the original trust unchanged in substance and meaning, although somewhat modified in its form, and limited in its application. What substantially was the original trust? It was to sell the lands for the purpose of satisfying certain sums of money upon the requisition of the persons who might be entitled to demand the payment. What is the trust, as we now suppose it to exist? So far as the preferred debts are concerned, it is to sell the same lands for the purpose of paying the same sums, to the same persons, upon the same requisition. Nor are we certain that even a nominal change has been made in the trust. We are not certain that the persons for whose benefit the sale is to be made, may not justly be denominated creditors, although they have released the debtor from his personal liability; nor that the sums which they are entitled to receive may not properly retain the name of debts, although they are limited to be paid out of a particular fund. But we refuse to consider a question which is purely verbal, and has no bearing whatever upon the merits of the controversy. It is sufficient to say, that if by force of the agreement the trust is extinguished for its original purpose, it is by force of the same agreement, *uno flatu*, revived for another just as legitimate.

We come then to the decisive question. What is the true construction of the October agreement? Is a sale under its provisions to be made for the common and equal benefit, in pro-

portion to their demands, of all the creditors? Or is a preference given to particular debts, and the power to sell, in fact, limited to their payment? The latter in our opinion is the true and necessary construction.

In considering this question, there are two clauses in the agreement to which our particular attention must be directed, and these, omitting a provision which relates to a different subject, will be literally recited. By the first, the parties agree, "That arrangement be immediately made for the disposition of the whole trust property. That the same shall be offered for sale by the trustees, upon a reasonable advertisement of the time and place, under such conditions as will conduce to bring about a sale to the greatest advantage of the parties interested." Had there been no other provision in the agreement in relation to a sale, it would have been a fair and reasonable inference that the proceeds were to be distributed ratably among all the creditors in proportion to their demands, but the arrangement here mentioned, as the terms and conditions of a sale remained to be settled, it is evident, depended for its execution upon the consent of all the parties interested, and as it was foreseen that the consent of all might not be given, the next clause (which for a different purpose has already been recited) provides for the contingency. It is in these words, "and in the event of any one of the parties not consenting hereto, then a sale shall be made under the trust deed, upon the requisition of the other parties subscribers hereto, for payment of the bonds and notes held by them which are now due." Thus in the plainest terms making the amount of the bonds and notes then due, a gross charge upon the whole trust property, and empowering the trustees to sell the whole, for the purpose of satisfying the charge; and as the amicable arrangement first contemplated has wholly failed, it is this power, and this only, that the trustees can now be said to possess or be allowed to exercise. It is not however a separate and independent power. It is annexed to the estate of the trustees, defines its quality and determines its validity. The power expresses the trust upon which they hold the lands, and the trust thus expressed confirms their title.

Nor can it be doubted that the actual intentions of the parties entirely corresponded with the construction that we have given to their acts. They never meant to extinguish the trust. They meant that the trustees should continue to hold the estate substantially for the purposes for which the original trust was created. This is implied in the language of the agreement, that the sale should be made under the trust deed. It is evinced by the fact that the conveyances in execution of the agreement were made directly to the trustees, which, unless it was intended to clothe the trustees with the title, neither the parties nor their legal advisers, could ever have supposed was the course necessary or proper to be followed. And it is rendered still more evident by the terms of the conveyance from The Farmers Loan and Trust Company, in February, 1847, in which the habendum clause is to the trustees as joint tenants, for the purposes expressed in the original deed of trust.

Here we close the discussion, and the result is that *quacunqve via data*, from whatever direction we approach the case, the obstacles to a partition are found to be insuperable.

As every pretence of fraud or mistake is effectually refuted, we cannot annul or change the solemn agreement of the parties. To deprive the preferred bond-holders of their prior lien, their right to have the whole property sold, if necessary, for their exclusive benefit, would be an act of positive and manifest injustice; and upon the application of a single cestui que trust, to destroy the trust estate that all have united to create, an arbitrary exercise of power; and these are the consequences which a decree, such as we have been required to make, of necessity involves.

A partition however is not the only relief that is sought. It has been insisted that if a partition be denied, the bill ought to be retained for the purpose of settling the accounts of the parties, and by the present determination of their rights, preventing a multitude of future suits; and we have been referred to numerous authorities to show that for these purposes the equitable powers of the court may be justly invoked. The citation of these authorities was needless, for although it has been doubted

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by eminent jurists, whether the jurisdiction in question ought ever to have been assumed, the jurisdiction itself, in its practical exercise, has been long and firmly established. The difficulty is that there are no facts in the present case to require or warrant its exercise. There are in reality no accounts to be settled, and should our present determination stand, no future litigation that need be apprehended.

The sum to be paid to each of the parties interested, who may be entitled to a payment in the event of a sale, will be ascertained by a simple process in arithmetic, and for the purpose of enabling the trustees to make this necessary and easy computation, the original bonds and notes, the payment specified in the answers being indorsed thereon, have been placed in their hands, and are to be retained by them until the termination of the trust. It is true the bill alleges that the note now claimed by the defendant Lent, has been fully paid; but the explanation in the answers of the defendants, Vermilya and Lent, is full and satisfactory, and is uncontradicted by proof. The payments that, looking to the form of the receipts set forth in the bill, would seem to have been made by Rogers, were in reality advances made by Lent, under an agreement that he should retain the note for his security. What then are the questions that are to give rise to a multiplicity of suits? As between the parties interested, there are none, and as to the trustees, their conduct is not impeached, and their capacity and integrity are unquestioned. The course they are to follow in the execution of their trust, is exceedingly plain. They are to follow the rules that the original trust deed as modified by the agreement clearly prescribes, and they have not required, nor can they need any directions from the court in the performance of duties, which, we doubt not, they perfectly understand and will faithfully discharge.

The decree that must follow the observations we have made, we are fully aware, will greatly disappoint the expectations of the complainant and of his counsel; and we have already stated that our first impressions, had we followed them, would have led us to a different result. During the argument, we supposed, as all the counsel evidently supposed, that the proceeds

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of a sale, if made, were to be ratably distributed among all the creditors. Upon this supposition, there was an apparent equity in the complainant's case, that strongly inclined us to grant the relief that he seeks. We were unable to perceive that any one of the defendants could be injured by a partition, and we clearly saw that by an immediate sale, the interests of the complainant might be greatly prejudiced ; but when our examination of the papers, discovered to us the error into which we had fallen, the apparent equity that had misled us, wholly vanished.

The maxim of the Roman law, *nemo debet in communione invitatus teneri*, it is unjust that a part owner should be held to continue such in contradiction to his own wishes, embodies the principle upon which the jurisdiction of equity in cases of partition may justly be said to rest, and to the truth of the maxim we entirely assent. But the complainant is not a part owner, in the sense of the maxim. He is not a tenant in common, having an immediate right of possession. He can have no title to a partition, until the existing charges upon the lands shall have been satisfied, and by their satisfaction, the estate of the trustees shall have been divested ; and were there no existing charges, no estate in the trustees, he has precluded himself from asking a partition, by consenting to an agreement, that the lands shall be sold, and that, by no separate act of his, shall the sale be prevented.

The motion to refer, must therefore be denied, and the bill be dismissed with costs.



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Fiedler v. Day.

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## FIEDLER v. DAY and others.

An assignment of personal effects to trustees, in trust for the separate use of the wife of the grantor, which effects continue in his possession after the assignment, is fraudulent and void against a subsequent creditor, whose debt arose during the continuance of such possession.

The trustees under such transfer, took the grantor's note for the effects so left in his hands, and on the grantor's afterwards failing, he assigned his property for the benefit of his creditors, giving a preference to the note. *Held*, That this assignment was fraudulent as against creditors.

An assignment for creditors, fraudulent in respect of a principal preferred debt, is void *in toto*, although another preferred debt, and the unpreferred debts provided for, be all due in good faith.

(Before DUER, MASON and CAMPBELL, J. J.)

June 12; July 14, 1849

THIS was a judgment creditor's bill after the return of an execution unsatisfied. It was originally filed against George W. Day, the judgment debtor, and contained the allegation usual in such cases. It was afterwards amended by making the other defendants parties, and by setting forth that the defendant, Geo. W. Day, had, with intent to defraud subsequent creditors, executed an assignment to the defendants, Mangum and Sayre, for the benefit of his wife, the defendant Mary Day. George W. Day answered the original bill, but suffered the amended bill to be taken as confessed, as did his wife. Mangum and Sayre put in their answer, to which a replication was filed.

The facts as they appeared from the pleadings were briefly as follows :

On the 6th of March, 1846, George W. Day executed to Mangum and Sayre a deed conveying and transferring, together with a small interest in remainder in certain real estate, the sum of two thousand dollars, stated to be then invested by him as capital in the mercantile firm of Day & Sweet, of which firm he was a member ; in trust, to invest and reinvest the same, and to pay the interest to Mary Day, the wife of the grantor, for her sole and separate use during her natural life, and upon her death to convey and assign the principal to the grantor and his heirs and assigns.



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The deed contained an authority to the trustees, if they should deem it expedient, to loan the \$2000 to Day, or to any firm in which he was or might be a partner, with or without interest, on his or their own note, for as long a time as they should see fit.

Neither the money, nor the property in which it was invested, was delivered to the trustees, nor was there any change of the possession : but Day executed a note for \$2000, bearing even date with the trust deed, and payable on demand to Mangum and Sayre, as trustees.

The debt to the complainant was contracted in the beginning of August, 1846. On the 13th day of that month, George W. Day failed, and executed an assignment to the defendant, Mangum, of all his property, upon trust to sell and apply the proceeds in the first place to the payment of this note of \$2000, and of other specified debts amounting to \$790, and in the second place to distribute the remainder among the residue of his creditors.

*W. Watson*, for the complainant.

*F. Sayre*, for the defendants.

BY THE COURT. MASON, J.—The deed of trust to the defendants, Sayre and Mangum, was clearly void as to creditors. It was purely voluntary. There was no actual delivery of the money pretended to be conveyed to the trustees, or of the property in which it was said the money was invested, but the whole was retained in the hands of the grantor. The excuse offered by the trustees for not requiring it to be paid over is, that Day could not take the amount out of his business without great loss and sacrifice, and therefore they consented to let it remain in his hands without interest, merely receiving his note for the amount, payable to them as trustees. We are authorized to infer that it was without interest, as the answer does not allege that it bore interest, and the trustees were authorized to loan the amount to the grantor without interest. Nor does it appear that the note was negotiable, and no consideration having been given for it, as between the original parties, its payment could not have been

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enforced. By this arrangement the professed object of the deed, viz. to provide an income for the separate use of his wife, was entirely defeated, and Day, the grantor, retained the possession and enjoyment of the property in the same manner as if the deed had never been executed.

There is no ground on which the trust deed can be upheld. It was void at common law and by the express terms of the statute, (2 R. S. 136, § 5,) and it is void not only as to creditors existing at the time of the execution of the deed, but also as to the plaintiff who became a creditor subsequently thereto, and while the property still remained in the possession and under the control of the debtor; and this as well from the nature of the case, as by the express provisions of section six of the statute before referred to.

It is of no consequence that the defendants, Mangum and Sayre, deny all fraudulent intent. Such a denial is of no avail, when the answer admits facts conclusively showing the fraud. (*Cunningham v. Freeborn*, 11 Wend. 240.) The defendant, Day, by not answering the amended bill, which alleged that the deed was made with the intent to defraud subsequent creditors, has expressly admitted the intent so far as he was concerned.

If the trust deed is void, then the subsequent assignment to Mangum of the 13th August, 1846, is also void. It provides for the payment out of the proceeds of the assigned property, of this very sum of \$2000, to the defendants, Mangum and Sayre. Thus carrying out the fraudulent intent of the trust deed, and depriving the creditors of the amount thereof which they are entitled to have applied to the payment of their debts.

It was suggested on the argument, that the other preferred debts being for aught that appears, bona fide, and the assignment being for the benefit of all the creditors *pro rata*, after paying the preferred debts, this sum of \$2000, if it cannot be lawfully applied to the purposes declared in the assignment, increases by so much the amount to be distributed among the general creditors, and that the assignment should be upheld as to all the bona fide claims provided for.

But the terms of the statute, (2 R. S. 137, § 1,) are peremptory; they declare that the conveyance or assignment itself, made

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with intent to hinder, delay or defraud creditors, shall be void ; not that the provision or claims containing such fraudulent intent, shall be void ; and the uniform construction of the courts has been that a deed void in part, as being in violation of a statute, is void *in toto*. (*Mackie v. Cairns*, 5 Cow. 547 ; *Grover v. Wakeman*, 11 Wend. 187 ; *Webb v. Dagget*, 2 Barb. S. C. R. 9.)

The complainant is entitled to a decree declaring both the trust deed and the assignment fraudulent and void as to him, and that the defendant Mangum pay the amount of his judgment with interest and costs ; it appearing from Mangum's own affidavit, that he has received from the assigned premises more than sufficient for that purpose.

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DURANDO and others, Executors, &c. v. WYMAN.

Where one not a party to a lease, is shown to be in possession of demised premises, in subordination to such lease, without more ; the law presumes, in favor of the lessor, that he is an assignee of the lessee.

This presumption is rebutted by proof that during the possession of the third party, the lessor received from the lessee a surrender of the term.

Such surrender, if produced by the lessor, is an admission that the lessee, and not the occupant was at its date, the tenant of the lessor.

(Before DUEK, MASON and CAMPBELL, J. J.)

July 9 ; July 14, 1850.

THIS was an action in the court of common pleas, for the recovery of one quarters rent from Feb. 1, to May 1, 1843, against Wyman, as assignee of a lease executed by the plaintiffs testator, to one Flandrau. Wyman was proved to have been in the actual possession of the demised premises during the quarter, recognizing the existence of the lease and the testator's title. He showed on his part a judgment against Flandrau, and an execution thereon levied, upon his interest in the premises. The plaintiffs then produced a surrender of the lease

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to them by Flandrau, dated February 21, 1843, which was to take effect on the first day of May following.

Upon this the common pleas nonsuited the plaintiffs, who brought a writ of error to the supreme court under the former practice. The cause was transferred by the supreme court to this court, under the act of March 24, 1849.

*H. H. Burlock*, for the plaintiffs in error.

*C. A. Peabody*, for the defendant in error.

BY THE COURT. CAMPBELL, J.—We do not deem it necessary to consider at length the various points taken on the argument of this case. Conceding that where a man is shown to be in possession of leasehold premises without any thing more, that the presumption of law is that he is in as an assignee of the original tenant, (4 Hill, 116,) and that a defendant may be charged in the declaration as assignee generally, though, in fact, he is only assignee of a portion of the demised premises, (2 Barb. S. C. R. 643;) also, that the judgment against Flandrau and execution levied, constituted no defence to this suit;—conceding these points, (and we are of opinion that if their decision were material, they ought all to be decided in favor of the plaintiffs in error,) still there is another point which presents, we think, an insuperable difficulty, and is entirely conclusive; and though we may feel that the plaintiffs in error have equities, yet we must affirm the judgment of the common pleas.

The plaintiffs accepted from Flandrau the original lessee, a surrender of the premises on the 21st of February, 1843, by which the term was to end on the first day of May following. The present suit is brought to recover the quarter's rent due May 1st, 1843, and the defendant is sought to be charged as assignee of Flandrau. If the presumption of law had been that the defendant was in possession as assignee of Flandrau, that presumption was entirely rebutted by the surrender, which instrument was produced on the trial by the plaintiffs themselves. The proof of an actual assignment, if there was such, then rested upon the plaintiffs. There was no such proof on

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their part, nor did they offer to produce any. Indeed we might go further and say that the production of the surrender, not only rebutted the presumption of law, but was an actual and positive admission on the trial, that Flandrau, and not the defendant, was the tenant. The presumption of law being rebutted, and there being such admission, the whole ground work of the plaintiffs action was gone. There was nothing to be submitted to the jury. The non-suit was properly granted, and the judgment of the court of common pleas must be affirmed.

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**THE AMOSKEAG MANUFACTURING CO. v. SPEAR & RIPLEY.**

Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior repute as his may be the means of gaining.

He is entitled to the protection of the law, in the exclusive use of the trade-mark thus appropriated by him. The public interests, as well as his own, require this. One who affixes to his own goods a copy or imitation of the trade-mark of another, commits a fraud upon the public and upon the owner of such mark. As to the latter, there is a damage which may be such as not to admit of compensation.

Equity will restrain the wrong doer by injunction, upon the grounds of protecting the owner in the exercise of a legal right, the suppression of fraud and the prevention of irreparable mischief.

An injunction will be granted with great caution, and not where the legal right is disputed and doubtful, nor so as to create or risk the creation of a monopoly.

The wrong in these cases, consists in the sale of the goods of the fabric of one person, as being those made by another; and it is only to the extent in which the false representation is directly or indirectly made, that an injunction ought to be granted.

The imitation may be complete, or may be limited or partial. In the latter event, though the proprietor's name may be omitted, and the imitator's substituted, yet if the peculiar devices or symbols be so copied as to manifest a design to mislead the public, and will probably produce that effect, an injunction will be granted.

There is no exclusive right in the use of marks, symbols or letters, which merely indicate the appropriate name, mode or process of manufacture, or the peculiar or relative quality of the fabric manufactured, as distinguished from those marks which indicate the time, origin or ownership of the fabric.

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Thus, where the letters "A C A" were used by a manufacturer of tickings, as designating the first quality of his fabrics, and the same letters were subsequently used by another manufacturer of the same article for the same purpose, it was *held*, that the latter could not be restrained from so using the letters.

An acquiescence by the owner of a trade-mark, in its use by another, is revocable, and confers no right after the license is withdrawn.

(Before DUNE, J., at Special Term.)

July 12, 13 ; July 28, 1849.

THIS was a motion to dissolve or modify an injunction, which had been granted *ex parte* on giving security.

The plaintiffs are a corporation in the state of New Hampshire, engaged in manufacturing cotton goods at or near Amoskeag Falls, since 1831. The complaint, verified June 16, 1850, stated that a principal article of their manufacture has always been ticking, which by care, skill, and at great expense, they had brought to a state of great perfection, and the best quality had deservedly acquired a great reputation throughout the United States. That for thirteen years past, they have used a printed paper ticket or label, devised by them for the purpose, to designate such first quality of their ticking, which printed ticket, mark, stamp or label, they placed conspicuously on the outside of each piece of ticking of the best quality before offering it for sale. That this mark has become identified with their first quality of ticking, and such ticking is commonly called and designated, among dealers in the article, as the "A C A ticking."

(The plaintiffs annexed two specimens of their label, one engraved on wood, which they used till within two or three years past ; the other on copper, now in use. The words and letters, and their arrangement, and the fancy border on each are the same ; the latter being square externally, and elliptical or oblong within, and both labels are printed in red ink. The arrangement was thus :

" Amoskeag Manufacturing Company  
Power Loom.

Yds. —————

**A C A**

Amoskeag Falls, N. H."

The words in the upper and lower lines being printed in an elliptic line on the label.)

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The complaint stated that the capital letters A C A, (which were printed very large and conspicuous,) signified as follows: "A C," Amoskeag Company; "A" first quality. That their ticking thus marked had acquired a very extended and enviable reputation.

That the defendants, in 1844, fraudulently caused to be prepared a stamp or label similar to the plaintiffs, having the letters A C A thereon in capitals, in a corresponding position with, a similar border and color, showing the same general appearance; which was intended to be an imitation of the plaintiffs mark or label, and designed as a fraud upon the plaintiffs and an imposition on the public.

(A specimen of the defendants label was attached. The size, color, fancy border, position, arrangement, and general size of the letters, corresponded with those of the plaintiffs. The face of the letters was quite different. The "A C A" larger than in the plaintiffs engraved plate, and very similar to their wood plate. The words upon it, were as follows:

" Lowell Premium Ticking  
Power Loom.

Yds.—

A C A

Warranted Indigo Blue.")

The complaint further stated, that the defendants for five years past had been extensively engaged in the city of New York in selling tickings, not manufactured by the plaintiffs, with a stamp or label on each piece, as last above described, in imitation of the plaintiffs, and used so as to sell such tickings as tickings made by the plaintiffs, and that the defendants have sold and do sell them as being the genuine tickings of the plaintiffs manufacture. That those so sold by the defendants, are of inferior quality to the plaintiffs, and the effect has been to depress the price and injure the reputation of the latter. Other damages were stated, and the loss to the plaintiffs estimated as at least \$10,000; while the defendants were charged to have realised by their sales, a profit of at least \$4000 a year.

The complaint prayed for an injunction against the defendants making, purchasing or procuring any marks, stamps, la-

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bels or tickets, of the kind so used by them ; and from using the same on any tickings in their possession, under their control, or offered or kept for sale by them or for their benefit ; and from selling, offering for sale or keeping, any tickings with such label thereon ; and from making, procuring or using, upon any tickings, any label similar to the plaintiffs, or an imitation of it, or having thereon the letters A C A ; and from selling, keeping or offering for sale, any tickings so labelled, as the real A C A, which were not so, &c.

The complaint prayed an account and judgment for profits made by the defendants, and for the plaintiffs other damages.

Affidavits were attached to the complaint, in support of the facts stated, and showing that the defendants sold their tickings as the real A C A tickings, upon application for the plaintiffs A C A tickings.

An injunction was granted, in the terms prayed by the complaint.

The defendants answer, duly verified, admitted the plaintiffs manufacture, use of their labels and quality, of their goods. It stated that the designations of the various styles or kinds of domestic manufactures, shirtings, sheetings, drillings, tickings, &c., are usually made by the use of the letters of the alphabet ; sometimes by one, sometimes by more than one, and in various combinations ; the same letters being used to denote one quality. The answer denied, that as to the plaintiffs or any other manufacturer, the letters used were understood, or deemed or reputed to be initials or abbreviations of the maker's name, or the place of manufacture ; or that the letters A C A in reference to the plaintiffs tickings, were ever understood by the defendants, or as they believe by the trade or dealers generally, to mean "A C," the plaintiff's name, and "A," first quality ; or that their tickings are, or for five years past have been, known or spoken of as the A C A tickings, without the addition of the description *Amoskeag A C A tickings*, in the same manner as the defendants are known as the "*Lowell Premium A C A tickings*."

That in all manufactures, articles found to suit the public, are made by as many as can find it profitable, and are made



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to resemble what has proved acceptable, in quality, surface, strength, beauty, &c. Such articles, when extensively made, require and derive designating names, which for public convenience, and without suspicion of unfairness, are used by all making the same style of goods. That every manufacturer of tickings, as well as the plaintiffs, makes tickings designated by the letters (A A) (A) (B) (C) (D); and in all cases the name of the maker or place of manufacture is the means of enabling purchasers and the public to choose between articles of similar quality derived from different manufacturers. That there are other tickings, known in the trade as A C A tickings, besides those manufactured by the plaintiffs and defendants, and distinguished by the name of the establishment where made.

The answer stated the defendants to be extensive sellers of domestic goods, as agents and otherwise. That from the fall of 1844, they have used the label on tickings, as set forth in the complaint, until May, 1850, with the full knowledge of the public and the plaintiffs, and without any complaint of the latter, until December, 1849. They deny that its use was intended as a fraud or imposition, or to sell their tickings as being made by the plaintiffs, or that any such effects were ever produced, or that they ever sold, or offered to sell them as the plaintiffs mark. They have sold theirs as the genuine A C A tickings, but with the designation always perfectly understood that they were Lowell, and not Amoskeag tickings. They traverse the inferiority or any injury from that cause, admit that the competition may have lessened plaintiff's sales, and deny any liability for damages. They insist plaintiffs acquiescence since 1844, in their use of the label, ought to preclude the maintaining the action.

That in December last, on being applied to by some one on behalf of the plaintiffs, not to use the label in question, as being similar to, and displeasing to the plaintiffs; the defendants, notwithstanding their clear right to use it, at once consented to change it. Not deeming the matter urgent, and being pressed with business, they neglected it until early in May last, when, being reminded of it, they ordered a new label, which has been prepared, and they have used none of their old label since the

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4th of May, nor sold any goods labelled with it since, except a small quantity labelled before the new one was procured. And that all this was known to the plaintiffs before they verified their complaint.

(Fac-similes of the form of the defendants new label were subjoined. They are in red ink, with square borders, and the upper and lower lines printed parallel to the top and bottom. The words used are the same as in their former label. The letters used in the centre were as follows: one label with the letters A C A in large capitals, as before; one with A A, in similar capitals; one with A, and one with B; the two latter having smaller letters. The general appearance of the label A C A, independent of the words, was altogether unlike the plaintiffs label.)

The answer further stated that the exposition of their former label in a conspicuous place on the pieces of ticking, made any attempt at deception idle, and no such was ever made or thought of by the defendants.

On this answer, a motion was made to dissolve the injunction. The plaintiffs read in opposition, numerous affidavits, to the effect that many dealers in tickings had been deceived by the defendants' label, and tending to support the allegations of the complaint.

*D. Lord*, for the defendants.

*A. F. Smith* and *W. Kent*, for the plaintiffs.

BY THE COURT. DUER, J.—I am satisfied that this injunction ought not to be wholly dissolved, and equally so that upon the case, as it now stands, it cannot be sustained in the full extent to which it has been granted.

I shall first state the general rules that, as I conceive, belong to the subject, and then endeavor to apply those rules to the special facts in this case.

It has been said, that the doctrine of an exclusive property in trade-marks has prevailed from the time of the year books, (2 Keen, 218;) but it is certain that the jurisdiction, in relation to

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such marks, that courts of equity now exercise, is of recent origin. Originally the party claiming to be the owner of a trade-mark, was left to establish his right and seek his remedy in a court of law. Lord Hardwicke refused an injunction, in a case in which, at the present day, one would certainly be granted, and he accompanied the refusal with the remark, that "he knew of no instance of granting an injunction to restrain one trader from using the trade-mark of another, and that, in his opinion, it would be of mischievous consequence to do so." (*Blanchard v. Hill*, 2 Atk. 284.) The apprehension of mischievous consequences that this eminent judge felt and expressed, experience has shown to be groundless, and the doctrine which he rejected, is now established, and established, as all admit, upon just and rational grounds.

Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a court as an act of justice, but the interests of the public, as well as of individuals, require that the necessary protection shall be given. It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage a competition by which the interests of the public are sure to be promoted ; a competition that stimulates effort and leads to excellence from the certainty of an adequate reward. When we consider the nature of the wrong that is committed when the right of property in a trade-mark is invaded, the necessity for the interposition of a court of equity becomes still more apparent. He who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use, the profits

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to which the superior skill and enterprise of the other had given him a prior and exclusive title. He *endeavors* by a false representation, to effect a dishonest purpose ; he commits a fraud upon the public, and upon the true owner of the trade-mark. The purchaser has imposed upon him an article that he never meant to buy, and the owner is robbed of the fruits of the reputation that he had successfully labored to earn. In his case there is a fraud coupled with damage, and a court of equity in refusing to restrain the wrong doer by an injunction, would violate the principles upon which a large portion of its jurisdiction is founded, and abjure the exercise of its most important functions, the suppression of fraud and the prevention of a mischief that otherwise may prove to be irreparable.

*omit* The principles that have now been stated as the foundation of the jurisdiction of the court, are clearly expressed or necessarily implied in nearly all the decisions ; [and I refer especially to the language of the judges in *Blofield v. Payne*, 4 B. & Ad. 410, and in *Crawshay v. Thompson*, 4 Man. & Gr. 357 ; and to the lucid opinions of the master of the rolls in *Knott v. Cologan*, 2 Keen, 213 ; and in *Croft v. Day*, 7 Beavan, 84.] It is not, however, to be denied that the power of granting an injunction to restrain an unauthorized use of trade-marks, ought to be exercised with great caution, so as not to transgress the limits that a just regard to the rights of individuals and the interests of the public must be admitted to prescribe. It is not to be exercised where the legal right is disputed and is doubtful ; it is not to be exercised so as to involve a violation of the principles upon which it is founded ; it is not to be exercised so as to create a monopoly unjust to other manufacturers, and, of necessity, prejudicial to the public. The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed ; but he has no right to an exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify

others may employ with equal truth, and therefore have an equal right to employ, for the same purpose. Were such an appropriation to be sanctioned by an injunction, the action of a court of equity would be as injurious to the public as it is now beneficial; it would have the effect in many instances of creating a monopoly in the sale of particular goods, as exclusive as if secured by a patent, and freed from any limitation of time. The importance of the distinction that I have endeavored to explain, in its application to the present case will hereafter appear. At present, it is sufficient to say, that in all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor, as those of another, and it is only when this false representation is directly or indirectly made, and only *to the extent in which it is made*, that the party who appeals to the justice of the court can have a title to relief.

It is evident, however, that in order to convey a false impression to the mind of the public as to the true origin or manufacture of goods it is not necessary that the imitation of an original trade-mark shall be exact or perfect. It may be limited and partial. It may embrace variations that a comparison with the original would instantly disclose, yet a resemblance may still exist that was designed to mislead the public, and the effect intended may have been produced; nor can it be doubted that whenever this design is apparent, and this effect has followed, an injunction may rightfully be issued, and ought to be issued.

To select a case of a very partial imitation. No person can be justified in affixing to his own goods, whether by stamp, label, or otherwise, the name or style of another person, firm, or company known to be the manufacturers of similar goods; although all other particulars contained in the real trade-mark of those manufacturers, may be wholly omitted. Such a use of the names or style of other manufacturers, is, generally speaking, conclusive evidence of a fraudulent intent; but even where no fraud can be justly imputed, where the use of the name or style originated in mistake, and not in design, although the party may be exempted from damages and costs, the continuance of the use may be justly restrained, since it involves a vio-

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lation of a right of property, that if persisted in with a knowledge of the fact, would be fraudulent. In *Millington v. Fox*, 3 Mylne & Craig, 338, the defendants had stamped upon the steel which they sold, the words "Crawley," or "Crawley Millington;" not knowing or believing that these were the names of other manufacturers, and were stamped by them upon steel of their own manufacture; but supposing that the words were descriptive of the particular kind or quality of the steel. Their mistake, however, was rendered apparent by the evidence, and upon this ground Lord Cottenham, while he wholly acquitted them of any fraudulent design, decreed a perpetual injunction. Such, I conceive, is the true explanation of a decision, the authority of which the learned counsel for the defendants strenuously denied, while on the other hand it was urged by the counsel for the plaintiffs as supporting a doctrine much broader than it appears to warrant.

Nor is it by any means necessary, in order to render the imitation of a trade-mark culpable, and justify the interference of the court, that it shall contain any forgery, (for as such, the act when intentional, deserves to be branded,) of the name of the owner of the original mark, or of the person from whom he derived his title. In addition to the name of the proprietor, the original mark may exhibit some peculiar device, vignette or symbol, stamped, printed or engraved, which he had a perfect right to appropriate, and which, as well as the name, was intended as a declaration to the public of his right of property, and was adopted as an additional security against its invasion. In an imitation of the original mark upon an article or goods of the same description, the name of the proprietor may be omitted, another name, that of the imitator himself may be substituted, but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded. Its objects, we may be certain, was not to communicate the truth, but to escape the penalty of falsehood; a fraud is intended, an unlawful gain is meant to be realized, but it is believed or hoped that an injunction may be avoided, and a claim for profits or damages be repelled. The

fraud, however, if a court of equity is true to its principles, will be suppressed and its fruits be intercepted or restored.

My conclusions on this branch of the subject are, that an injunction ought to be granted, whenever the design of a person who imitates a trade-mark, his design apparent or proved, is to impose his own goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable or even possible consequence; and that an injunction must be granted whenever the public is in fact misled, whether intentionally or otherwise, by the imitation or adoption of marks, forms or symbols which the party who first employed them had a right to appropriate, and this for the plain reason that when a right of property has been thus acquired, it must be protected.

It must not, however, be inferred from these remarks, that an injunction ought to be granted whenever there exists such a resemblance between trade-marks as may induce a belief in the mind of the public that they belong to, and designate the goods of, the same trader or manufacturer. It is not enough that the public may be misled, or has been misled. As already intimated, the resemblance must arise from the imitation or adoption of those words, marks or signs, which the person who first employed them had a right to appropriate as indicating the true origin or ownership of the article or fabric to which they are attached; and the resemblance, where it induces error and gives a title to relief, must amount to a false representation express or implied, designed or accidental, of the same fact. A trade-mark is frequently designed to convey information as to several distinct and independent facts, and therefore contains separate words, marks or signs, applicable to each, thus indicating not only the origin or ownership of the article or fabric to which it is attached, but its appropriate name, the mode or process of its manufacture, and its *peculiar* or relative quality. It is certain, however, that the use by another manufacturer of the words or signs indicative only of these circumstances, may yet have the effect of misleading the public as to the true origin of the goods; but it would be unreasonable to suppose that he is therefore precluded from using them as an



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expression of the facts which they really signify, and which may be just as true in relation to his goods as to those of another. Purchasers may be deceived; they may buy the goods of one person as those of another, but they are not deceived by a false representation; they are deceived because certain words or signs suggest a meaning to their minds, which they do not in reality bear and were not designed to convey. We may draw an illustration from the present case. The goods of the defendants, to which their trade-mark is attached, are certainly "tickings," they are woven by a power-loom, and they are the first quality of the tickings which they manufacture or sell. Hence they have a perfect right to print or stamp upon their label the words "Tickings," "Power-Loom," and "First Quality," or "Superfine," nor can I believe that their right to do so would in the slightest degree be impaired or affected, were it proved that the plaintiffs had previously, and for a long series of years, used the same words in their own trade-mark upon similar goods, and had founded upon such use a claim of exclusive property. Nor would the case, in my judgment, be altered, should it appear that owing to these circumstances the plaintiffs tickings had become generally known in the market as "Power-Loom Tickings," or "Superfine Tickings," so as to induce a general belief that all tickings upon which these words were labelled, were in reality their manufacture. This error, however general, could never confer the right of property which it supposes to exist. The counsel for the defendants strenuously insisted that names cannot be appropriated, that a just title to their exclusive use can never be acquired, and he doubtless referred to those names, general or specific, of things, modes or qualities, which form a part of our common language, and which all of us therefore, have a right to employ when we wish to *communicate* the facts they are used to signify; and thus explained, the proposition, so far from being at all doubtful, is a certain, and in its application to cases like the present, a luminous and a guiding truth.

The positions that have been thus stated and illustrated, appear to me so evidently true, as not to require any support from



authority; but the authorities are, in fact, numerous and decisive, and to a few of the cases I shall now refer.

The earliest case is *Singleton v. Bolton*, 3 Doug. 293. The plaintiff's father, and after his death the plaintiff had been, for a long time, in the practice of selling a particular medicine, under the name of "Dr. Johnson's Yellow Ointment;" the defendant had commenced selling the same ointment under the same name, and for this supposed invasion of his exclusive right, the plaintiff brought his action. Although these facts were proved upon the trial, the plaintiff was non-suited, and the non-suit was confirmed by the court of king's bench. Lord Mansfield, in giving the opinion of the court, said, that it was not pretended that the plaintiff had any *exclusive* right in the *medicine itself*, and the defendant had, therefore, an equal right to prepare and sell it under the same name that the plaintiff used, there being no evidence to show that he sold it as if prepared by the plaintiff; in other words, there being no false representation. In this case, the words "Doctor Johnson" were the name of the inventor of the medicine, but by long use they had become a part of the proper name of the medicine itself, which name all persons had, consequently an equal right to employ.

The case of *Canham v. Jones*, 2 Ves. & Beames, 218, was decided by the vice-chancellor, (Sir Thomas Plumer,) upon the same principle. The bill was filed to restrain the defendant from preparing and selling a medicine called "Verno's Vegetable Syrup," and it asserted that the plaintiff had acquired an exclusive right in the medicine itself, and in the use of the name by which it was generally known. To this bill there was a general demurrer, and upon the argument the plaintiff's counsel did not attempt to maintain his case upon the ground that he could justly claim an exclusive right in the medicine, but they insisted that he had acquired the right, by a prior occupation, of using exclusively the particular name by which the medicine was called, and that the defendant was guilty of a fraudulent invasion of this right, in selling the composition prepared by himself by the same name. The vice-chancellor was, however, of opinion that, as the plaintiff had no exclusive right in the medicine,

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it was a necessary consequence that he could have none in the use of its name, and therefore allowing the demurrer.

In *Perry v. Truffit*, 6 Beavan, 66, the plaintiff was the original vendor of a medicine which he labelled as "Perry's Medicated Mexican Balm." The defendant afterwards prepared and sold the same or a similar medicine, which he labelled as "Truffit's Medicated Mexican Balm." The bill was in the usual form for an injunction and an account. An injunction was denied, but although the master of the rolls, when he refused it, retained the bill for the purpose of enabling the plaintiff to establish his right by an action at law, he was evidently of opinion that his legal right could never be established. His opinion evidently was, that as the words "Medicated Mexican Balm" might be just as true a description of the medicine of the defendant as of that of the plaintiff, the former had an equal right to use them. This opinion seems to cover the whole ground. "Balm" was the general, "Mexican Balm" the specific name of the medicine, and the word "Medicated" indicated its quality and the mode of its preparation. No action at law was brought by the plaintiff, plainly from the conviction of his counsel, that he could not succeed, and the bill was finally dismissed, with costs.

In *Millington v. Fox*, had the defendants been right in their supposition that the words "Crawley" and "Crawley Millington," were descriptive only of the kind or quality of the steel upon which they were stamped, it is manifest, both from the arguments and admissions of the counsel, and the reasoning of the chancellor, that a perpetual injunction would not have been decreed.

I shall now proceed to apply the observations that have been made to the facts in this case. When I compare the original trade-mark of the plaintiffs with that set forth in the complaint, of which the defendants have now relinquished the use, I find it impossible to doubt that the latter is a designed, elaborate imitation of the former. They are the same in form, size and color; it is only by a very close inspection, that the ornamented border can be at all distinguished. In the centre of each we find the same words and letters in the same relative positions, "Power Loom"; "yds."; "A C A"; and the only differences are, that at

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the top, immediately under the vignette, the words "Lowell Premium Tickings," are substituted, in the label of the defendants, for the words "Amoskeag Manufacturing Company," in that of the plaintiffs, and at the bottom the words "Warranted Indigo Blue," for "Amoskeag Falls, N. H."; variations scarcely impairing, far less sufficient to destroy, a general resemblance that was calculated to deceive the public, and by which the evidence is abundant and conclusive to show that many dealers have been, in fact, deceived. Under these circumstances, I cannot attach any importance to the denial by the defendants in their answer, of any intention to injure or defraud the plaintiffs. They acted with a design, and it would be absurd to suppose that this design had no further object than the mere imitation of the trade-mark which they copied. In attaching their simulated label to tickings resembling in appearance and quality those of the plaintiffs, they undoubtedly meant to gain an advantage in the sale; they meant to secure to their goods a preference in the market that they would not otherwise have commanded; nor can I understand how this advantage could be gained, unless their tickings were to be sold and purchased as those of the plaintiffs. Had they only wished to secure a preference to their goods, *as their own*, an imitation of the trade-mark of the manufacturers was worse than useless. It had a direct tendency to defeat that object, and it is manifest that had such been their object, no such imitation would have been attempted or thought of. It would not have been attempted or thought of, but from the hope of gains it was to be the means and instrument of realizing. I cannot, therefore, escape from the conviction that the real motive of the defendants was an expectation of the benefits to result to themselves from the error of purchasers, and from the imposition upon purchasers that subordinate dealers would be tempted and enabled to practice; and I assent entirely to the observations of the vice-chancellor, in *Coates v. Holbrook*, 2 Sandford's Ch. Rep. 586, that even where no false representation is directly made, the imitation of a trade-mark, prompted by such motives, is, in judgment of law, a fraud, the profits of which must be accounted for, and the continuance of which a court of equity is bound to inhibit.

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It is said, however, and was strongly pressed upon the argument, that the defendants had provided an effectual security against the imposition of dealers, and the mistakes of purchasers, by substituting upon their label the words "Lowell Premium Tickings," in place of "Amoskeag Manufacturing Company," in that of the plaintiffs; but I cannot think so. I cannot think that this security is provided, or was meant to be provided, for not only may the substituted words, as is proved to have been the case, from their position, wholly escape the attention of purchasers, but when read, they may not have the effect of altering the belief that the general resemblance of the labels is calculated to produce. The words are exceedingly ambiguous; they are not a declaration that the tickings are not manufactured by the plaintiffs, but are entirely consistent with the supposition that they are. As the label upon which they are found is, in other respects, that of the plaintiffs, they may well be construed as an assertion that tickings belonging to the plaintiffs, corresponding in quality with those to which the label is attached, had gained, at Lowell, the premium to which the words refer; nor is it at all improbable that many purchasers have thus understood them, and have believed that the very fact that such a premium had been gained, was the cause of an alteration in the label. If the defendants were personally asked, whether the tickings which they sell are the manufacture of the plaintiffs, it would be an equivocation to reply, abstaining from a positive negative, "They are Lowell Premium Tickings." And it is this equivocation which they stamp upon their label, and which they utter to all who purchase the tickings to which that label is attached. I do not pretend to know the exact meaning of the words "Lowell Premium Tickings," nor have the defendants or their counsel attempted to explain them. Their apparent meaning, that which at once strikes the mind, is, that tickings of the same fabric as those which the words are used to designate, in a competition at Lowell, had gained a premium, as the best quality of American tickings; and if this assertion is untrue, whether injurious or not to the plaintiffs, it is a fraud upon the public. It is possible that the defendants may attach a different meaning to the words, and that the meaning which they attach to them may be true:

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but if so, as the words are equivocal and are calculated to deceive the public, their use, until their true meaning is explained, ought to be discontinued, and, I hope, will be discontinued.

Were it in my power, however, to view the conduct of the defendants in a more favorable light than I am now able to do, could I wholly acquit them of any fraudulent intent, it still remains true that they have imitated and adopted those parts of an original trade-mark which the plaintiffs had a right to appropriate for the purpose of securing their own title as manufacturers, and that the public had been misled by the resemblance in the labels thus produced, and I have already stated that the concurrence of these facts is alone sufficient to render it the duty of the court to interfere by an injunction.

The allegation that there has been such an acquiescence for some years on the part of the plaintiffs in the conduct of the defendants, as to bar the former from the relief they now seek, I cannot regard; not only is the allegation sufficiently disproved, but I am satisfied that the doctrine of acquiescence operating as an absolute surrender of an exclusive right, is inapplicable to the case. The consent of a manufacturer to the use or imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether expressed or implied, when purely gratuitous, may certainly be withdrawn, and when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license. The existence of the fact may be a very proper subject of inquiry in taking an account of profits, if such an account shall hereafter be decreed; but even the admission of the fact would furnish no reason for refusing an injunction.

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As a necessary consequence of what has been said, I must retain all that part of the injunction which precedes the words "or having thereon the letters 'A C A'," to which I add the words "or being a colorable imitation thereof." I borrow these last words from the form of the injunction which was granted and framed by the master of the rolls in *Knott v. Morgan*, and which he afterwards followed in *Croft v. Day*; and I adopt them in the sense in which he doubtless employed them, as denoting such an imitation as is designed and calculated to mislead

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the public as to the true origin or ownership of the article or fabric to which it is attached.

I pass now to the question which the parties evidently consider as practically the most important, namely, whether the residue of the injunction shall be stricken out or retained? The injunction, as it now stands, prohibits the defendants from using any stamp, mark, or label, for or upon any tickings having thereon the letters "A C A," and the propriety of continuing this prohibition in force, depends upon the fact whether the plaintiffs have shown an exclusive title to the use of these letters upon their own tickings as declaratory of their right of property as manufacturers. If they have, the prohibition must be retained, but if the letters "A C A," as used by them, are merely an indication of the relative quality of their tickings, it must be expunged. As the plaintiffs could not have acquired by their prior occupation, an exclusive right in the use of the words "First Quality," or "Superfine," they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning. It is immaterial whether words, or letters, or figures, or any other signs, are used, if the single fact which they are used to indicate or declare, is a truth that other manufacturers or dealers have an equal right to express and communicate.

The complaint avers that the letters "A C A" signify as follows: "A C," Amoskeag Company, and "A," best quality—and several of the witnesses, whose affidavits are produced, swear that the letters are so understood by them, and as they believe, are so generally understood. On the other hand, these allegations are explicitly denied by the defendants, who aver in their answer that it is the universal practice of manufacturers to distinguish the various qualities of their goods by one or more letters of the alphabet, and that the letters "A C A" in the label of the plaintiffs, are only used and intended to be understood as a declaration to the public, that the tickings to which the label is attached, are the best quality of those which they manufacture. Such are not the exact words, but such is the substance of the averments in the answer, and the conclusion to which

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my reflections have led me, is that these averments are true. I was doubtless of importance to the plaintiffs to make known to the public by a declaration in their label, that they are the manufacturers of the excellent tickings which they send into the market, and for this reason the name of their corporation "Amoskeag Manufacturing Company," appears in full upon their label. The purchasers of the tickings either read these words or they do not; if they do, the letters "A C A," even if they understand them as indicating the name of the company give them no additional information; if they do not, the meaning of the letters, if such is their meaning, will not be understood. To the first, the letters thus interpreted are useless, and to the second unintelligible; it is a self-evident truth, that initial letters can never communicate the knowledge of a name to those who were previously ignorant of it. The only purpose they can answer is that of recalling a name already known. Nor is this all; the letters "A C," considered as initials, would not probably have the effect even of recalling the name which they are said to signify; to answer this purpose, it is plainly necessary that the initial letter of each word comprising the name, whether of an individual or of a corporation, should be given, and this, where initials are used as the substitute for a name, is the universal practice. Here the letter "M" is omitted, yet the word "Manufacturing" is an essential part of the corporate name; it is therefore highly improbable that the letters "A C" were used by the plaintiffs in a sense in which it was most unlikely that others would understand them. They probably adopted these letters because they were partly the initials of their corporate name, but it is not, I am persuaded, for the purpose of signifying that name, and thus indicating their ownership that they employ them; their value and meaning is wholly different. The final letter "A," we are told, is alone used to designate the quality of the tickings; it alone signifies that they are the best quality of those which the plaintiffs manufacture; but if this were true, the letters "A C" might be erased, and the final "A" as a designation of that quality, would alone be sufficient. It is, however, admitted that such is not the fact. Another label which the plaintiffs attach to their tickings was



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produced upon the hearing, resembling in all respects that set forth in the complaint, except that the single letter "A" is found in the same place as the three letters "A C A," and it was admitted that this label is only attached to tickings of the second quality—while that containing the three letters is reserved and is used exclusively for those of the best. The conclusion is not to be resisted ; it is to designate the best quality of tickings that the three letters are used, it is this purpose which they answer, and none other.

The plaintiffs aver in their complaint that they have invented a stamp or label, the same which they set forth "by which to designate the best quality of their tickings;" but how have they effected this object? Strike from their label the letters "A C," there is no such designation ; restore them, it is found. As the use of the three letters conjointly is therefore necessary to express the meaning which the plaintiffs admit that they intended to convey, I am forced to believe that it was for this purpose that they were first adopted, and are alone employed. It is doubtless true, as is stated in the complaint, and sworn in many of the affidavits, that the tickings of the plaintiffs, to which their A C A label is attached, have for many years been known in the market as the "A C A Tickings," but this fact neither alters the meaning of the letters, nor takes from others the right to employ them. If the letters designate only the quality of the goods and not their origin or ownership, the tickings of the defendants, if the best quality of those which they sell, are as truly "A C A Tickings" as those of the plaintiffs. The words "Power Loom" are found upon the label of the plaintiffs, yet it is not contended that I could restrain the defendant from using the same words as they have done upon their own. If there exists a distinction, I am unable to perceive it. The claim of an exclusive right rests in both cases upon the same grounds ; it is valid in both, or in neither.

Were my opinion upon this question less clear and decided than it actually is, I should still be unable to retain the injunction in its present form. The rule is fully settled and is recognized in nearly all the cases that in suits of this nature an injunction is never to be granted in the first instance, if the exclu-



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sive title of the plaintiff is denied, unless the grounds upon which it is denied are manifestly frivolous. When the title is disputed, the course is to let the motion for an injunction stand over until the plaintiff has established his legal right in an action at law. The obligation of following this general rule, was distinctly admitted by our late chancellor, in *Partridge v. Menck*, 2 Sandf. Ch. R. 622, 625; S. C. 2 Barb. Ch. R. 101. In *Motley v. Downman*, 3 Mylne & Craig, 14, where the rule was followed, Lord Cottenham uses the strong expressions that "he cannot conceive a case in which the court will interfere at once by an injunction so as to prevent the defendant from disputing the plaintiff's legal title." The legal title of the plaintiffs in the present case to the exclusive use of these significant letters A C A, is denied, and certainly not upon frivolous grounds, since I have not understood the counsel for the plaintiffs to deny, that if the averments in the answer shall be sustained by proof, the title as claimed cannot be supported. By our present practice, I cannot direct an action at law to enable the plaintiffs to establish their right, for if I rightly understand the provisions of the code, the present suit is such an action, and in reality every complaint, whatever the nature of the facts set forth, or the relief that is sought, is at once a declaration at law, and a bill in equity. I can give to the defendants, however, the benefit of the general rule, by so modifying the injunction as not to restrain them from using the letters A C A, until the legal right of the plaintiff shall have been established by the verdict of a jury in this suit, and I am satisfied that it is this course that I should be bound to follow even were my opinion as to their legal right widely different from that which I have expressed. The injunction must therefore be modified by striking out all that part of it which commences with the words "or having thereon," and ends with the words "ticket or otherwise."<sup>(a)</sup> No costs are given to either party, and I presume none are desired.

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(a) The injunction was thereupon modified so as to leave the defendants at liberty to use the letters A C A in their labels.

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I ought not to close this opinion without expressing my thanks to the counsel of the parties for the singular ability, learning, and candor with which they conducted the argument. The task of a judge, when thus assisted, is comparatively light and his errors hardly to be excused.

**CASES OF PRACTICE,**  
**AND**  
**DECISIONS IN SPECIAL PROCEEDINGS,**  
**AT THE GENERAL AND SPECIAL TERMS,**  
**AND AT CHAMBERS.(a)**

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**LEE v. AVERILL.**

Under the act to abolish imprisonment for debt, a warrant for the arrest of the defendant, issued before the service of the summons by which the suit is commenced, is void.

On discharging a party arrested under such a warrant, the judge cannot impose as terms, that he shall not bring an action.

Nov. 1848.

MOTION before a justice of the court at chambers, to discharge a defendant from arrest upon a warrant issued under the act of 1831, to abolish imprisonment for debt in certain cases. The summons and complaint were delivered to the sheriff to be served on the defendant, before application was made for the warrant, but the warrant was issued, before either the summons or complaint were served. In fact the sheriff served all three at the same time.

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(a) It will be observed that very few cases of practice are reported, in which the decision was not in effect the judgment of at least three justices of the court.

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Spring Valley Shot and Lead Co. v. Jackson.

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*J. W. Gilbert*, for the defendant.

*P. Reynolds*, for the plaintiff.

VANDERPOEL, J.—The warrant was clearly void. Section 106 of the code (of 1848,) applies, and the suit was not commenced when it was issued. The 79th section relates merely to saving the statute of limitations. The defendant must be discharged. I am asked to impose as a condition that he will not sue for false imprisonment, but I have no control over the matter.

Defendant discharged.

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THE SPRING VALLEY SHOT AND LEAD CO. v. JACKSON &  
ROBINS.

Where a plaintiff, claiming over four hundred dollars, on the proof in the cause appears to be entitled to less than two hundred dollars, and by reason of set-offs recovers less than fifty dollars, he is not entitled to the costs of the suit.

The words "*claim established at the trial*," in the statute regulating costs, mean a claim so proved and established that it will entitle the plaintiff to judgment, unless it be reduced by a set-off. Establishing the claim presumptively, will not suffice, where it is defeated by counter-proof.

December 30, 1848.

APPEAL from the decision of one of the justices at chambers, awarding the costs of the suit to the defendants. The suit was upon a guaranty dated April 27, 1847, by which the defendants became liable for all sums of money which might be received by Robins & Allen, of Boston, the plaintiffs agents, as the net proceeds of shot or other property which might be consigned to that firm for sale, by the plaintiffs. The agency terminated January 25, 1848, and the plaintiffs claimed that there was due to them a balance of \$414 51, for shot sold and unaccounted for by Robins

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& Allen. The cause was tried before referees, who reported \$41 76 as due from the defendants to the plaintiffs.

On the trial, the plaintiffs proved by the accounts rendered by Robins & Allen, that there was a balance of shot to the above amount, unaccounted for. The principal item which went to constitute this balance, was a parcel of 248 bags of shot of the net value of \$347 20.

On the other hand, the defendants proved that the proceeds of sales accounted for by Robins & Allen, within the period covered by the guaranty, exceeded the entire amount of the consignments within the same period, by the sum of \$98 38. From the account thus proved, an item of \$120, claimed to their credit by Robins & Allen, was disallowed by the referees.

It was proved by the defendants, that the 248 bags of shot were forwarded before the date of the guaranty, and were not in Robins & Allen's hands at or after the date of the guaranty; and the plaintiffs' claim for the same was disallowed by the referees.

Besides the \$120, with which the referees charged the defendants, they disallowed a claim of 20 14 for commissions, made by Robins & Allen.

The result was, that the plaintiffs, claiming a balance of \$414 51, succeeded in having allowed to them \$120, and the defendants claiming \$98 38, were allowed \$78 24; and for the balance, \$41 76, the plaintiffs recovered.

*J. C. Smith*, for the plaintiffs, referred to 2 R. S. 226, § 4, subdiv. 4; 2 Ib. 614, § 9.

*A. Williams*, for the defendant, cited *Matteson v. Bloomfield*, 10 Wend. 555, and note to that case.

**BY THE COURT.**—The statute allows costs to the plaintiffs, where he shall recover any sum in a court of record, if it appear that his claim, as established at the trial exceeded two hundred dollars, and the same was reduced by set-offs;—or that the debts, demands and accounts of both parties established on the trial, exceeded four hundred dollars. (2 R. S. 614, § 9.) The act regu-

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Gouverneur v. Warner.

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lating courts of justices of the peace, precludes those courts from taking cognizance of matters of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars. (2 Ib. 226, § 4.)

This expression does not differ essentially from that used in the act respecting costs. The right to costs in this case, turns upon the construction of the word "established," in the statute. The plaintiffs made out by their opening proof, a claim to the amount of over four hundred dollars, but the proof on the part of the defendants showed that their claim was in fact less than one hundred and fifty dollars. It was not reduced by set-offs; and the accounts of both parties claimed at the trial, as actually made out by all the evidence, were less than four hundred dollars.

The spirit of the cases cited from 10 Wendell, and the language of the acts, show that the expression "established at the trial," do not mean, a claim that shall be proved *prima facie* merely, but one so proved and established, that a judgment will be given upon it, unless a set-off prevents. If a claim presumptively made out, be defeated by counter proof, it is not *established* within the meaning of the statute; whether such defeat be occasioned by contesting the claim itself, or by proof of payment. If the claim proved were over two hundred dollars, and were reduced by set-offs, the plaintiffs would be entitled to costs.

The appeal must be dismissed.

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GOUVERNEUR and another v. WARNER.

The plaintiff in a judgment, who has filed a creditor's bill, and obtained a receiver of the defendant's property, will not be permitted to levy an alias execution on personal property covered by such receivership.

A levy made thereon, will be set aside on the defendant's application, unless the plaintiff will waive his receivership and dismiss his creditor's suit.

Dec. 30, 1848.

APPEAL from an order made by one of the justices at chambers. The affidavits disclosed these facts: On the 29th of No-

vember, 1848, the plaintiff issued an alias fieri facias on the judgment in this cause, to the sheriff of the county of Putnam, by virtue of which the sheriff levied on certain household furniture, and other chattels, formerly belonging to the defendant, but which he had some years before transferred to F. L. Warner, in whose possession they were.

In March, 1848, on the return of a previous execution wholly unsatisfied, the plaintiffs exhibited a creditor's bill against the defendant in the supreme court in equity, which was put at issue by answer and replication in June. The usual order for a receiver was made in the suit, and a receiver was appointed, to whom the defendant, on the 13th of April, under the direction of the referee, executed the customary assignment of all his property and effects of every description. The plaintiffs proceeded in the creditor's suit, and examined the defendant at great length, before the referee, touching this personal property, and also in like manner examined F. L. Warner as a witness on the same subject. After this, the reference was no farther proceeded in, and the creditor's suit had been suspended for some time before the alias execution was issued.

Upon this state of facts, the defendant moved to set aside the execution, or for other relief. The justice at chambers made an order that the levy be set aside and the execution stayed as to the furniture and chattels in question, unless the plaintiffs should elect to dismiss their bill in equity and vacate their receivership of the property. The plaintiffs appealed.

*Jona. Miller*, for the plaintiffs.

*H. H. Warner*, for the defendant.

BY THE COURT.—As we understand the effect of the plaintiffs proceedings in equity, the assignment to the receiver vested in him all the title and interest which the defendant had in this personal property, when the bill was filed. If the defendant had any interest, upon which an execution could then be levied, it was transmitted to the receiver. The alleged fraudulent transfer of the goods, though valid against the defendant, could not

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Fuller v. Emeric.

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prevent his creditors from proceeding to vacate it in the name of any person to whom his title was passed by operation of law. An assignee in bankruptcy or insolvency, as well as a receiver in a creditor's suit, may proceed to set aside the fraudulent transfer. In this case, the plaintiffs had two remedies under their equity proceeding, to reach the property in question. They could amend their bill and make F. L. Warner a party to the suit; or they could institute a distinct suit in the name of the receiver, to set aside the alleged fraudulent conveyance.

We think they were not at liberty to go back, and treat the property as being still vested in the defendant, and resort anew to an execution at law, pending their suit in equity.

The authorities to which the plaintiff's counsel referred, are not applicable, for the reason that in them there had been no transfer to a receiver, and the plaintiffs, by their suit in equity, had acquired no more than an equitable lien.

It was objected to the motion, that the defendant has no interest in the matter, and that a motion in his behalf ought not to be entertained. In this the plaintiffs are clearly mistaken. A motion to set aside an execution for irregularity, can only be made by the defendant. The court will not hear a stranger on such an application. And there may be very good reasons why in this case, the defendant should not have two distinct remedies pursued against him for the same matter, at the same time.

The defendant insists that the order at chambers should have been absolute, for the reason that the plaintiffs had already made their election to proceed in equity. We need not review the order on this point, as the defendant has not appealed.

Appeal dismissed.

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FULLER v. EMERIC and others.

The writ of *ne exeat*, or equitable bail, is abolished by the code of procedure.

Arrest and bail, as provisional remedies in civil actions of an equitable nature, can be obtained only in the cases, and in the manner, prescribed by the code.

Jan. 13th ; Jan. 20th, 1849.

THIS was a motion to discharge the defendant Emeric from



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Fuller v. Emeric.

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arrest, &c., under an order made by SANDFORD, J., on the 10th day of August last, in the nature of a writ of ne exeat. After the defendant was arrested, and on the 17th of August the same justice made an order discharging Emeric from custody, on his executing an undertaking, in \$2000, with surety, conditioned as provided in respect of bail in the code of procedure. The defendant gave an undertaking accordingly.

The complaint set forth the existence of a partnership between Emeric and Fuller, in merchant tailors goods; that the firm and the partners had become insolvent; that Emeric, at the same time, had conducted an extensive mercantile business on his sole account; and on the failure, had, without Fuller's consent, and against his wishes, executed an assignment of all his own property and of all the property of Fuller and Emeric, to one St. Felix, in trust for his creditors, giving a preference to debts contracted by him in his sole business. That since the assignment, Emeric had taken off two thousand dollars of the property of Emeric and Fuller, with the avowed intention of applying it to his own use; and he had also declared that he would remove with his family to Havanna, if any legal proceedings were instituted against him.

The residence of Emeric was at Rahway, New Jersey; his place of business was in the city of New York.

The affidavits in support of the defendant's motion denied the taking of any property after the assignment, and denied that he had ever intended or threatened to remove his family to Havanna, or elsewhere. He also denied that the arrangement between Fuller and himself, constituted F. a partner.

*E. C. Benedict*, for the plaintiff.

*E. Sandford* and *F. R. Tillou*, for the defendant.

BY THE COURT. SANDFORD, J.—The code of procedure declares that it is expedient to abolish the distinction between legal and equitable remedies, and thereupon enacts that all remedies in courts of justice, shall consist of two classes, viz., actions and special proceedings. Actions are divided into civil and criminal.

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Fuller v. Emeric.

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This suit is therefore a *civil action*, as defined and established by the code of procedure.

The seventh title of the code is devoted to "the provisional remedies in civil actions," and three are treated of at large. These are, 1. Arrest and bail; 2. Claim and delivery of personal property; and, 3. Injunction. Under the first head, section 153, provides that "no person shall be arrested in a civil action, except as prescribed by this act." Some exceptions are made, which are not applicable to this case. The chapter then proceeds to define the cases in which the defendant may be arrested, and the manner of obtaining such arrest. The complaint in this case was not framed to set forth either of the cases defined in the code, and in sustaining the arrest made, but little reliance was placed upon this ground.

The defendant's arrest was upon an order of a justice of the court, in the nature and form of a writ of *ne exeat*, as practised in the late court of chancery. It directed the sheriff to cause the defendant to come before him and give sufficient bail or security in two thousand dollars, that he would not depart out of the jurisdiction of the state, &c., and in default of such bail, to commit him to the common jail until he should do it of his own accord.

The effect of the order was, to arrest the defendant, in a civil action, and as we will assume, in a case for which the chapter of the code, touching arrest and bail, does not provide.

It is contended that chapter fourth of the same title (Code, § 200,) left the practice of issuing *ne exeats* in full force, and the order in question was made upon that understanding. The chapter is entitled "Other provisional remedies;" and it enacts, that until the legislature shall otherwise provide, the court may appoint receivers, &c., "and grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act."

On full consideration of the point, we are all agreed that this section does not save the process of *ne exeat*. That process was one for the *arrest* of a party in a civil action. The 153d section is positive that no such arrest shall be made, except as *prescribed* by the code. The code does not prescribe a *ne exeat*,

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Allen v. Johnson.

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and it prescribes the specific cases in which parties may be arrested, not including the case made by this complaint. The reservation of *other* provisional remedies, in § 200, seems to be intended for remedies other than those provided by the code itself; and if that be not the necessary inference, the concluding paragraph, "except as otherwise provided in this act," is a plain declaration that where the act gives a provisional remedy, and makes it applicable to all cases in which such remedy is permissible, the corresponding existing remedy according to the practice when the act took effect, is superseded.

The first report of the Commissioners on Practice and Pleadings, (page 161,) shows that it was their intention by the code, to abolish the writ of *ne exeat*, or equitable bail, not at a future time, but manifestly by the bill accompanying their report. We think the act, as enacted by the legislature, carried this intention into effect. We find no good reason for supposing that the provisions for arrest and bail, were intended for legal rights and claims, to the exclusion of those which are of an equitable character. They apply to all "civil actions," which term embraces an equity suit between partners, as well as a case of *trover* and conversion.

The defendant must be discharged, and his undertaking returned to him to be cancelled, on his relinquishing all supposed rights of action growing out of his arrest.

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ALLEN v. JOHNSON.

On an appeal from an order made by a justice at chambers, it is not necessary to execute an undertaking under the code of procedure.

January 20, 1849.

On an appeal from an order made by one of the justices at chambers, the respondent insisted that the appeal was irregular and should be dismissed, because no undertaking had been filed. The order appealed from, struck out parts of the answer in the cause, as redundant and immaterial.

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Sheldon v. Allerton.

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*N. B. Blunt*, for the respondent.

*L. R. Marsh*, for the appellant.

BY THE COURT.—If it be necessary in appeals under the 299th section of the code of procedure, to give the security prescribed on appeals from judgments, it is quite apparent that it will be extremely inconvenient, and greatly embarrass the business of the court. The orders made by a justice at chambers, are often necessarily made without much discussion or time for deliberation, and we have been in the habit of reviewing them very freely before the whole court.

We have come to the conclusion, on examining the code, that it is not necessary to give security on such appeals. The section says these appeals may be taken "*in like manner*" as those from final judgments. This language has full effect, if we apply it to the appeal itself, as distinguished from giving the security. The section regulating appeals from judgments, (§ 297,) plainly recognizes this distinction. So the 275th section declares how appeals in general shall be made, and the giving of security is no part of the requisition. That is required in certain classes of appeals, by distinct sections.

We think there is no occasion for extending the giving of security to appeals from orders made by a single justice, and that a true interpretation of the code does not require it.

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SHELDON v. ALLERTON and others.

The allowance in addition to the costs, under section 263 and 264 of the code of procedure of 1848, will be what the court deem a reasonable and moderate counsel fee in the cause.

January 20, 1849.

In this case the suit was for the foreclosure of a mortgage. There were numerous parties defendant, three of whom put in separate answers. The cause was noticed for trial, and finally

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Duffy v. Morgan.

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an inquest was taken for about three thousand five hundred dollars as the amount due. The plaintiff claimed an allowance under the code in addition to the costs, and the court, after hearing the defendants' counsel, allowed him two per cent. on the amount recovered. The court held, that in making these allowances, it would be governed by what appeared to be a reasonable and moderate counsel fee under the circumstances of each case.

*H. P. Hastings*, for the plaintiff.

*A. L. Pinney*, for the defendants.

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DUFFY v. MORGAN.

On an appeal from a justice's court, it is not proof of the non-residence of the respondent, to show that she could not be found at her place of residence, and it could not be ascertained where she was staying.

January 20, 1849.

MOTION to dismiss an appeal from one of the assistant justice's courts, on the ground that the copy of the affidavit for the appeal was not served on the respondent, within the time limited by section 304 of the code of procedure. The copy was served on the attorney for the respondent, within that time; and it was stated in the affidavits of service, that the appellant used great diligence to make the service on the respondent. That he called at the respondent's place of residence in this city, and could not find her there; was referred to another house, where it was said she had gone to service, and on calling there, was told they did not know where she was; and finally that she could not be found within the twenty days.

THE COURT held this evidence to be insufficient to show that the respondent was not a resident of the city of New York, and dismissed the appeal.

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Williams v. Cunningham.

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WILLIAMS v. CUNNINGHAM.

An appellant from a justice's court, must in his affidavit, point out specifically, on what point or ground, he alleges the judgment to be erroneous.

January 20, 1849.

MOTION to dismiss an appeal from an assistant justice. The affidavit of the appellant stated the proceedings and the testimony in the court below, but did not specify any particular ground on which he appealed.

THE COURT said, the code requires this expressly. (Code of 1848, § 303.) The appellant must put his finger on the point relied upon, or distinctly inform his adversary on what ground he alleges that there is error in the judgment.

Appeal dismissed.(a)

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GARDNER v. KELLY.

AHSBAHS v. COUSSIN.

A plaintiff residing out of the city of New York, though within this state, must give security for costs, notwithstanding the court may issue executions against property to any county in the state.

This rule applied to a certiorari brought to reverse a justice's judgment.

The code of procedure does not repeal the revised statutes relative to security for costs.

A defendant who has been let in to defend, after a default and judgment, the latter standing as security, may require security for costs from a non-resident plaintiff.

Jan. 27, 1849 ; also March 10, 1849.

THESE were motions for security for costs, heard at bar. In *Ahsbahs v. Coussin*, the case was pending on a certiorari to the

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(a) In a subsequent case, *Sullivan v. McDonald*, April 28, 1849, the affidavit set forth various objections as having been taken at the trial and overruled, but did not state the grounds on which the party appealed.

THE COURT dismissed the appeal because of this omission.

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Gardner v. Kelly.—Ahsbahr v. Cousin.

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marine court. The plaintiff in error resided in the city of Brooklyn.

*C. A. Rapallo*, for the defendant in error, cited Laws of 1828, ch. 137, § 5, 13, 14, 22; Laws of 1840, ch. 386, § 29, 30; Laws of 1844, ch. 104, § 5, 7; Code of Procedure, § 39, 241 to 243, 246; 2 R. S. 620, § 1.

*J. T. Brady*, for the plaintiff in error.

BY THE COURT.—This motion presents the question whether a person residing in the city of Brooklyn, is bound to give security for costs, on prosecuting a certiorari in this court, to reverse a judgment against him in one of the inferior courts. Formerly there was no question about it, but it is supposed that the change made in the law as to issuing executions from this court to the other counties of the state, has worked a change in the application of the revised statutes to plaintiffs prosecuting in the court, though residing out of the city of New York. We do not see that these provisions in the act of May 14, 1840, affect the case. The act has made no change in the jurisdiction of the court, properly so called. The jurisdiction is precisely as it was before. Certain remedies have been added, for the enforcement of its judgments. But no remedy against the person of judgment debtors has been added. We think the practice must remain as it has always been considered, and non-residents of the city must give the security if required.

Motion granted.

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In the other cause, *Gardner v. Kelly*, March 10, 1849, the question was presented to the court again, in an action commenced by a non-resident, and it was contended that by the code of procedure, the statute requiring security for costs, was repealed or abolished.

BY THE COURT.—The code of procedure, (section 258,) repeals all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions. The provision

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Whitney v. Bayard.

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for security for costs, is a title of a chapter of the revised statutes entitled, "Of costs and fees of officers ;"—which chapter establishes the rate of costs in civil actions. Is this provision entirely swept away by the code, or is the latter confined to such parts of the previous statutes as regulate costs, as between the parties, and in respect of attorney and counsel fees ? The repealing clause does not apply to this title by name ; and we think the title is not affected by the code. A provision for security for costs, does not affect costs themselves, or regulate them. It is a distinct and independent subject. Although there has been a default and judgment, and the latter stands as security, while the defendant is let in to defend ; we think he is entitled to require security for costs. It is not an application to the favor of the court, but a statute right. It might have been imposed at the time, as terms of opening the default, that he should not require security, but it is too late now.

Rule accordingly.(a)

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WHITNEY v. BAYARD.

On an appeal from a justice's court, the judgment will be reversed by default, if the respondent do not appear to argue the appeal.

Jany. 27, 1849.

IN this case, the respondent did not appear, on the appeal being moved, and the question was raised, whether under the code of procedure, this court would reverse the judgment below by default, or must look into the case on an argument *ex parte*.

THE COURT said the appeal is a mere substitute for the for-

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(a) In a subsequent case, *Phenix v. Townsend*, the plaintiff, who resided in the county of Cayuga, at the commencement of the suit, subsequently assigned the demand in suit to a resident of the city of New York, and this fact was set up in opposition to a motion for security for costs. CAMPBELL, J., nevertheless decided that the plaintiff must give security for costs.



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Warner v. Wigers.

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mer certiorari, to bring up the judgment for review. On the certiorari, error was assigned in form, and judgment was always reversed by default, if the defendant in error did not appear. In the affidavit for the appeal, there is a regular assignment of errors required by the statute. The legal effect of the proceeding is the same as before. The nature of the case is not changed, and the practice must be the same.

Judgment reversed by default.

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WARNER v. WIGERS.

Where there are issues of law and fact, and the cause is brought on for trial of the latter, the court will then determine whether it shall be tried before the issue of law is disposed of.

If tried without objection, it will be deemed to have been first tried by the order of the court.

February 9, 1849.

THERE were issues of law and of fact in this case. Both parties noticed the cause for trial at the trial term, and it was tried on the issue of fact, without objection. It was now contended that this was irregular, and that the verdict should be set aside, because the issue of law was not first disposed of, pursuant to section 206 of the code of procedure. (Laws of 1848.)

VANDERPOEL, J., after advisement with his associates, held that both parties having concurred in bringing on the trial of the issue of fact, thus consenting to that course; it must be deemed to have been tried first by the order of the court, within the meaning of the code.

He said that it was the opinion of all the justices of the court, and such will be the practice in future, that whenever a cause was moved on the trial calendar, in which there was an issue of law pending, the court will then determine whether the issue of fact shall be first tried or not. And it is not necessary to obtain a previous order on the subject.

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Dunham v. Nicholson.

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DUNHAM v. NICHOLSON.

An action in the nature of the former creditor's suit, may be maintained, where an execution was issued and returned unsatisfied before July 1, 1848, when the code of procedure took effect.

Such a suit is not an action on the judgment, within the meaning of the prohibition in the code.

A frivolous answer in such a suit, stricken out on motion, and an order for judgment made, with a direction for the examination of the defendant touching his property.

February 24, 1849.

APPEAL by the defendant, from an order made by one of the justices at chambers, striking out the answer of the defendant as frivolous, directing that the plaintiff have judgment, and that the defendant appear before one of the justices of the court, and submit to an examination on oath touching his property and the judgment to be given, with leave to the plaintiff to examine witnesses thereupon. The complaint was in substance the same as the former creditor's bill in the court of chancery, on a judgment and the return of an execution unsatisfied.

The execution was issued May 13th, 1848, after the enactment of the code of procedure. The points made appear in the decision.

*J. T. Brady*, for the appellant.

*J. S. Sandford* and *M. Porter*, for the respondent.

BY THE COURT.—It is insisted that under the code of procedure, a complaint in the nature of a creditor's bill, will not lie. We find however, that the supplemental act, (Laws of 1848, ch. 380, § 2,) does not apply the provisions of the code for proceedings after execution, to existing suits, except where the execution was issued after the code took effect. The language is, "executions hereafter issued;" which means, not after April 12, 1848, the date of the passage of the act; but after

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McCafferty v. Kelly.

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July 1, 1848, when the act went into operation and from which date it speaks.

It is quite clear therefore, that there could be no proceeding had under the code, for the examination of the defendant, founded upon the return of this execution. As to the argument founded on the abolition of bills of discovery, (Code of 1848, § 343;) that provision does not apply to the examination of a debtor touching his property, but to the ordinary discovery sought by bills and made by answer. This proceeding is in aid of an execution on a judgment already obtained. The creditor's suit in respect to existing cases, is not in terms abolished, and there is no other remedy open to the plaintiff. All existing remedies not inconsistent with the code, were retained.

Again, it is said this is an action on a judgment, which is prohibited by section 64 of the code of 1848. We think it is not such an action, within the meaning of that section. Though it assumes the form of an action, it is really a proceeding to carry out an existing judgment, and to aid the process issued upon it. We have no doubt the suit was properly brought.

The answer put in was clearly insufficient as an answer under the old system, and it was properly stricken out. As to the examination directed, there is no reason for applying a different rule from that formerly prevailing. There might be a personal examination of the defendant under the code, if the answer had stood, and no more is directed by the order.

Order affirmed.

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McCAFFERTY v. KELLY.

On an appeal from a justice's court, the court below must make a return of all the testimony and proceedings, where a return is ordered. It is not sufficient to make a return as to the particulars in which the affidavits are conflicting.

February 24, 1849.

THIS was an appeal from the marine court. On moving the

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Gihon v. Fryatt.

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cause for argument, it appeared that the affidavits were conflicting in some particulars, and a return had been ordered. The return made by the court below, set forth only the testimony in respect of which the parties differed in their affidavits.

*P. Mulvey*, for the appellant.

*Nash & Donohue*, for the respondent.

BY THE COURT. OAKLEY, CH. J.—The court below must make a return of all the testimony and proceedings, when a return is ordered, although the affidavits conflict only in a few particulars. Such is the provision of the code. When a return is made, we look solely to that. We cannot look into the affidavits also. If the return here, be insufficient to present the whole case, the parties must call for a further return.

A further return was ordered.

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GIHON v. FRYATT & CAMPBELL.

On a motion to set off one judgment against another, the effect of which will be to deprive the attorney of one of the parties of his costs, the court will dispose of the motion according to its views of what is right, under the circumstances.

Where the judgment sought to be extinguished in such a case, was for costs only, the court refused to order a set-off.

March 10, 1849.

THIS was a motion by the plaintiff to set off a judgment for costs, about to be entered in favor of the defendants, against judgments held by the plaintiff against those parties. The facts appear in the judgment of the court.

BY THE COURT.—Gihon sued Fryatt & Campbell, and a judgment in case of a nonsuit was rendered against him. The judgment is not yet entered, or the costs taxed. It appears that Gihon is the owner of former judgments obtained by him against Fryatt

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Short v. May.

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& Campbell, and now moves to set off enough of those judgments, against the one about to be entered in this suit for costs, to extinguish the amount of the latter. The motion presents the question how far the court, in such a case, will protect or regard the attorney's costs of suit. The subject was before us some time since, in *Smith v. Lowden*, 1 Sand. 696, and the principle was stated that where the application is by way of motion to set off the judgments, we will dispose of each case according to our own views of what is right upon the circumstances.

When the question arises on pleadings in a suit, the rules of law must govern ; but where the application is to the discretion of the court, we will decide it as shall be just. The court cannot fail to see, that although technically the costs belong to the party, yet in point of fact they belong to the attorney, and we mean to adhere to the rule giving effect to the substantial rights of the parties.

Here all the judgment (it being a judgment in case of nonsuit,) really belongs to the attorney.

Motion denied.

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SHORT v. MAY.

The court will permit a plaintiff to file a reply, after the time limited in an order to file it or that the same be deemed abandoned, where the omission is explained. So, where a copy was inadvertently filed instead of the original.

March 10, 1849.

THE defendant obtained an order that the plaintiff file his reply within ten days, or that it be deemed abandoned. The plaintiff inadvertently filed a copy, instead of the original reply, and the defendant thereupon applied for an order that the reply be deemed abandoned. The plaintiff asked leave to file the original reply. The defendant contended that the court had no power to relieve the plaintiff, and that the statute was imperative.

THE COURT held that such a strict construction was not re-

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**Brockway v. Stanton.**

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quisite. The statute established a general rule, which must be conformed to ; but it did not deprive the court of a discretion to remedy the consequences of such an inadvertence. That the provision was in its nature directory. Plaintiff allowed to file the reply on the payment of costs.

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**BROCKWAY v. STANTON.**

A party residing out of the state may be examined as a witness, on a commission, at the instance of the adverse party.

March 17, 1849.

MOTION by the defendant, for a commission to examine the plaintiff as a witness ; the latter residing in the state of Pennsylvania, more than one hundred miles from this city. It was contended that the code does not authorise such a commission.

OAKLEY, CH. J., after advising with his associates, decided, that as the code provides for the examination of a party as a witness, and that he may be compelled to testify in the same manner as any other witness, either at the trial, or conditionally or on a commission ; there is no doubt that the commission ought to issue in this case.

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**SWIFT v. FALCONER and JEWETT.**

In an assistant justice's court, the plaintiff must prove his demand although the defendant interposes no defence. The default does not admit the plaintiff's claim.

March 10th ; March 17th, 1849.

APPEAL by the defendants from a judgment in one of the assistant justices courts ; where the plaintiff recovered in an action

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Renouil v. Harris.

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upon a previous judgment. The amount of the latter was set forth in the complaint below. The defendants pleaded three pleas, which the justice on a subsequent day, struck out as frivolous on the plaintiff's motion, and thereupon without any testimony or proof being given or offered, rendered a judgment for the amount of the plaintiff's claim.

*E. C. Gray*, for the appellants.

*S. Jones, Jr.*, for the respondent.

BY THE COURT. OAKLEY, CH. J.—It is claimed in support of this judgment, that under the code of procedure, the complaint is admitted, in a justice's court, if the defendant suffer a default or otherwise fail to make a defence to the action; and that the plaintiff is thereupon entitled to a judgment for his demand set forth in his complaint, without any evidence or proof whatever. In short, that in this respect justice's courts are put upon a footing with courts of record.

We think this is not the law. No copy of the complaint is served with the summons, and it would not be safe to permit the practice insisted upon. If, as we are told, such a practice has prevailed to some extent in this city, we can only say, it is time that it ceased. We think the code has wrought no change in this respect.

Judgment reversed.

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RENOUIL v. HARRIS.

In the city of New York, where each party names a referee under the code, and those two referees name a third; the latter becomes a referee and may act without any rule or order of the court.

A defective appointment of referees, is waived by proceeding to trial before them without objection.

An order referring "the cause," refers the whole cause, including the issues of law and fact.

If the report omit any one issue, an amendment will be allowed.

The prevailing party may enter judgment on the report of a referee, without any

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Renouil v. Harris.

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notice of the report to the adverse party, or any notice other than that of adjusting the costs by the clerk.

The attorney has nothing to do with making up the judgment roll. That is the duty of the clerk, and an irregularity, such as omitting a pleading, will not viti-  
tiate the judgment or execution.

The judgment roll is not irregular because it omits the case made by the referees; where there is no stay, the roll will be perfected before the case is made. If necessary, the court will order it to be annexed to the roll subsequently.

The court cannot directly or indirectly, enlarge the time limited by the code for appealing from an order or judgment.

A motion to set aside a judgment for irregularity, does not suspend the time for appealing; and if the time elapse before the motion be decided, the right to appeal is lost.

April 28; and again, Nov. 24, 1849.

(Before OAKLEY, CH. J., and VANDERPOEL and SANDFORD, Justices.)

**MOTION** to set aside report of referees, the judgment and the judgment roll, and the execution issued thereon.

The suit was commenced in July, 1848, for an account and payment of a balance claimed by the plaintiff from the defendant as his late co-partner. The answer set up various defences, and a replication was filed, taking issue.

The cause was referred by an order of the court appointing two referees; one selected by each of the parties. The two referees thus appointed, united in choosing a third referee, but there was no rule or order of the court, on his appointment.

The referees proceeded to hear the cause, and on the 14th of February, 1849, a majority of them reported a balance of \$251 46, due to the plaintiff. The report determined several distinct matters of fact and law, which were put in issue or presented by the pleadings; but it was contended by the defendant, that there were other questions of law raised on the pleadings, upon which the referees ought to have reported specifically.

No notice of the signing or filing the report, and no copy thereof was served on the defendant or his attorney; but on the 22d of February, service was made on his attorney of a notice that the plaintiff would, on the 24th, apply to the clerk of the court, to adjust the bill of costs and incorporate it in the judgment obtained in the suit. The defendant's attorney attended on the taxation of the costs. On the same 24th of February, the plaintiff filed the report of the referees, and the clerk



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entered the judgment. He also attached together, the complaint, summons, report, and all the other papers required by the code, to constitute the judgment roll, (which roll had then been prepared in form,) except the answer, which the clerk could not find on file; and filed the same as a judgment roll. The clerk furnished to the plaintiff's attorney, a transcript of the judgment as entered in the judgment book, who filed it with the county clerk, and on the same 24th of February, issued an execution thereon, against the personal and real property of the defendant.

It appeared by the affidavit of the defendant's attorney, that the answer had been filed with the clerk at the proper time, but the clerk did not find it; and pending the motion, a copy was substituted in the judgment roll.

The grounds upon which the motion was made, are stated in the opinion of the court.

*J. G. McAdam* and *D. W. Clarke*, for the defendant.

*H. A. Mott* and *B. Galbraith*, for the plaintiff.

BY THE COURT. SANDFORD, J.—The first class of objections arises upon the reference and the report. It is contended, 1. That the third referee must be appointed by a rule or order of the court, after he is named by the two referees first selected. This, we think, is not the meaning of the code. The selection of the third referee, is made exclusively by the two chosen by the parties. If those two cannot agree, he is to be selected by drawing a name from the jury box. The court has no agency in the matter, and no rule or order is necessary. (Code, § 229.) 2. "The cause" was referred, and it is said the order of reference did not indicate that the issues of law were embraced in it, or that the referees were to report upon the "whole issue." We think that when an order is made referring *the cause*, without any limitation; all the issues formed by the pleadings, are necessarily embraced in the reference, and that the referees therefore must report upon *the whole issue*. (Code, § 225, 227.)

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3. It is said the report does not state all the facts found and the conclusions of law upon them. On looking into the report, we find sufficient conclusions both of law and fact stated, to dispose of the material issues in the cause, and to sustain the damages reported. For the purposes of a review of the decision of the referees, the defendant will require a great deal more than the report would furnish him, which he claims ought to have been made. He will need a report in the nature of a case or bill of exceptions. (Code, § 227 )

As to the two first of these objections, we may add, that the parties having gone to trial before the three referees, and contested all the questions involved ; neither party should now be permitted to raise such objections ; and as to the third, if the report had omitted some one issue, it would be almost of course, to permit an amendment.

SECOND. The next class of objections, is upon the entry of the judgment. 1. Because no copy of the report was served on the defendant before its entry. It is true, our 45th rule required a copy of the report to be served, before entering *the rule* for judgment. But under the code, there is no rule for judgment ; and the practice for which the rule of court provided, is superseded by the provisions of the code as to proceedings upon references. A sufficient notice to guard against surprise, is contained in the provision requiring two days notice to be given of the application to the clerk to adjust the amount of costs. (Code, § 266.) The notice to cut off an appeal, is given after the decision or judgment. (§ 223.)

2. It is strenuously contended, that the judgment is irregular, because it was entered without the direction of a single judge. The defendant relies on section 233, which requires all judgments on issues, "to be entered in the first instance upon the direction of a single judge." (The court examined the point at large, and held, that no direction of a judge was necessary, and that the clerk must enter judgment at once upon filing the report. The amended code, (1849,) having made express provision for the case, the reasons assigned are omitted.)

THIRD. The regularity of the execution is next attacked ; and 1. Because the judgment roll was wrong in omitting the de-

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fendant's answer, and thus there was no legal judgment roll to sustain the docket, on which the execution issued.

As to this, the duty of the prevailing party ends, when he has filed the decision of the court and adjusted the costs. It is the clerk's duty to enter the judgment, and make up the judgment roll. (Code § 234 to 236.) The party has no control of the proceedings, nor any thing to do with it, beyond seeing to it that all the papers he is bound to furnish, are on file. We therefore think, that when on the entry of the judgment and the request of the party to docket it, the clerk furnishes to him a transcript of the docket, it is not his province to ascertain whether the clerk has performed his own duty in attaching together the proper papers, and filing the judgment roll. Whether a total omission of the clerk in that behalf, would impair the docket and execution ; or whether we would order it filed by relation, so as to protect both ; we need not now determine. Here there was a judgment roll filed. It may have been irregular, for want of the answer. If it were, it was not the plaintiff's fault ; the roll was not a nullity ; and we would sustain it, by directing the original answer or a copy to be attached, as of the date when the roll was filed. A copy was in fact attached, before the motion was brought on, and we hold that the roll is sufficient as it stands. (See *Clute v. Clute*, 4 Denio, 241.)

2. It is said the judgment roll must contain the case showing the proceedings before the referees, and that the defendant was entitled to ten days notice of the entry of the judgment, before the roll could be regularly filed. This we think is an entire mistake, as to the judgment entered on the referees report. In the judgment roll made up after the decision of the entire court on an appeal, the case should be inserted, unquestionably. The 223d section of the code, which provides for making a case, does not require it to be prepared sooner than within ten days after notice of the entry of the judgment, and it is the duty of the clerk to make up the roll immediately after entering the judgment. Of course, a judgment so entered and enrolled, could not contain the case ; and there is nothing in the code requiring the prevailing party to wait any length of time, before filing the decision and entering judgment, whether it be of one judge or of referees. The

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only restraint, is the two days notice of adjusting the costs. The 220th section, cited by the defendant, relates to questions reserved for consideration before the judge who tries the cause; not to cases made for review in the first instance before the entire court, at the general term.

The plaintiff's proceedings have been regular, and the motion must be denied.

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*Nov. 24th, 1849.*—The case was presented to the court again, on a motion to dismiss the appeal taken by the defendant from the judgment entered on the referees report. Notice of the entry of the judgment was given to the defendant's attorney on the 24th of February 1849; and notice of the appeal was not served until the 8th day of May. The delay was owing to the pendency of the foregoing motion to set aside the judgment, which was not decided at chambers till March 24th. The defendant appealed from the decision, and it was affirmed by the general term on the 28th of April. The defendant served his proposed case on the 25th of April, and it was settled on the 4th of June.

BY THE COURT. OAKLEY, CH. J.—The code of 1848 requires appeals to be made in ten days after written notice of the entry of the judgment (§ 280;) and if this appeal can be sustained, it must be on the ground, either that the motion to set aside the judgment, enlarged the time for appealing, or that this court may enlarge it. We have considered the matter, and conclude that neither ground is tenable. Where the time for appealing or the like, was regulated by a rule of court, in the former practice, it was in the power of the court at all times to relieve parties in default, so that there should be no failure of justice. But where the law directs anything to be done within a specified period, the court cannot interfere to extend it.

The provision in the code of 1848, was very stringent and very plain; and that part of the code which gave to a judge power to enlarge the time in certain cases, expressly excepted the time within which an appeal was to be taken. (§ 366.) The only mode in which we can extend the time for appealing, is by

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**Webb v. Clark.**

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an order suspending the entry of the judgment on good cause shown.

The defendant supposed the judgment could not be entered, until the case was made and settled. This is an error, there being no stay of proceedings. We think moreover, the case when settled may, by an order, be annexed to the judgment roll at any time ; as was frequently done with bills of exceptions under our former practice.

The motion to set aside the judgment did not affect the time for appealing. The party took the hazard of losing that remedy, in the event of failing in his motion. We regret very much the position in which this defendant is placed, but the appeal is too late, and it is not in our power to relieve him.

Appeal dismissed.

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**WEBB v. CLARK.**

Where the affidavit verifying the complaint is defective, the remedy of the party is by a motion to set it aside, and not by demurrer.

June, 1849.

**DEMURRER** to a complaint, for the reason that it was verified by a book-keeper, and no cause stated why it was not verified by the plaintiff.

*G. Clark*, for the defendant.

*G. W. Morell*, for the plaintiff.

**BY THE COURT.** **SANDFORD, J.**—The defendant has mistaken his remedy. He should have moved to set aside the complaint for irregularity. The verification forms no part of the pleading which can be considered on a demurrer.

Demurrer overruled.

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Laimbeer v. Allen.

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**LAIMBEER v. ALLEN and WHITTLESEY.**

The party verifying a pleading under the code, must subscribe his name to such pleading or to the affidavit appended.

An answer, regular in all respects except in the omission of the signature of the party to its verification, should not be disregarded, until notice is given of the defect and an opportunity afforded to correct it.

June 18, 1849.

**MOTION** to set aside a default and judgment. The defendant in time, served an answer, signed by their attorneys, and certified by a commissioner to have been verified before him by both defendants. Neither of them, however, appeared to have signed the answer or the affidavit which the commissioner certified. The plaintiff's attorney, treating the answer as a nullity, and without communicating with the attorneys for the defendants, entered a default and perfected judgment against the latter.

*T. C. T. Buckley*, for the motion, cited 3 J. R. 540; 25 Wen. 699; 3 Hill, 476.

*J. J. Radcliffe*, for the plaintiff, cited Amended Code, § 157; 1 Barb. Ch. Pr. 155, 603, 604; 1 Code Reporter, 63, 114; 2 Moulton's Ch. Pr. 27 to 29.

**BY THE COURT.** SANDFORD, J.—The answer was unquestionably defective, in the omission of the signatures of the parties verifying it. The practice has long been settled and uniform, that an affidavit should be signed by the deponent. A deposition, taken down by the officer, stands upon a different ground. (*Clark v. Sawyer*, 3 Sand. Ch. R. 352, 414.) But the plaintiff's attorney, instead of entering a default, should have notified the opposing attorneys of the defect, and if they did not promptly obviate it, he might then have treated it as a nullity, and proceeded to enter his judgment. We find this practice was established several years since, in the supreme court, and it is so fair and reasonable that we adopt it without hesitation.

**Motion granted.**

**POILLON v. HOUGHTON and others.**

**On an order, (in equity,) overruling a demurrer with costs, the prevailing party, may under the act of 1847, tax his costs and collect the same by a precept in the nature of an execution against personal property.**

**It is not necessary to enrol such an order. The taxed costs, must however be filed, before such an execution can be issued.**

**June 21, 1849.**

**MOTION to set aside a precept in the nature of a fieri facias against goods. On the 19th of May, 1849, the general term of this court, made an order overruling the defendants demurrer to the bill in equity of the plaintiff, (filed in the supreme court, and transferred to this court under the act of April, 1849,) with costs, and permitting the defendants to answer in twenty days, on payment of costs. The time to answer was afterwards extended. On the 6th of June, the plaintiff taxed his costs of the demurrer at \$56 73; but he never filed his taxed bill of costs. On the 11th of June, he issued to the sheriff of New York, a precept under the seal of the court, commanding him to levy those costs of the goods and chattels of the defendants. The sheriff levied on personal property by virtue of the precept. There was no order of the court directing or allowing a precept to issue, and no notice of applying for it, was given to the defendants.**

***F. Sayre*, for the defendants.**

***P. Y. Cutler*, for the plaintiff.**

**BY THE COURT. SANDFORD, J.—The provisions of the code of procedure, cited by the plaintiff, have no application, as they do not affect suits pending prior to the code.**

**The order overruling the demurrer, is an absolute order upon the defendants to pay the costs thereby occasioned. Under the former practice, the plaintiff would have enforced payment by process of contempt; but this was abolished by a statute on the**

Poillon v. Houghton.

24th of November, 1847, which provides that such costs may be collected by process in the nature of an execution against personal property, founded on the order of the court directing their payment. (Laws of 1847, ch. 390, page 491.) The precept in this case is such a process, and is thus warranted by the act cited.

The provision of the statute requiring an enrolment before execution, (2 R. S. 183, § 104,) and the consequent rule of the supreme court in equity, (Rule 77,) which is also the rule of this court; relate to *final decrees* alone. The order in question is purely interlocutory, so that no enrolment was necessary.

It is claimed that the 119th rule of the supreme court in equity, gave the defendants twenty days after the filing and service of a taxed bill, in which to pay these costs. That rule was framed in reference to the existing practice of imprisoning for contempt, in not paying such costs; the penalty being a commitment by an *ex parte* order, if the costs were not paid within the twenty days limited. We apprehend that with the abolition of the commitment, the reason of the rule ceases, and it should not be applied to the substituted remedy. We think the costs when taxed, under the present law, constituted a judgment, which is due and payable like any other judgment in a court of record. Waiving that point, there is another objection which is more difficult to be overcome. The plaintiff has not filed his taxed bill of costs; and the 88th rule of the supreme court in equity, is imperative that the taxed costs shall be filed, before the party shall be entitled to issue an execution or other process for their collection. This omission makes the precept in question irregular, and it must be set aside, on the defendants stipulating to bring no action. On such stipulation being given, the plaintiff must pay ten dollars costs of the motion.



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Megrath v. Van Wyck—Bagley v. Smith.

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**MEGRATH and HASBROUCK v. VAN WYCK.**

**A defendant cannot treat an amended complaint as a new suit, although it wholly change the nature of the action. His remedy, if any, is by a motion to set it aside.**

June 30, 1849.<sup>1</sup>

THE suit was commenced on the 26th of May, by a summons and complaint, in the nature of a replevin for goods taken. On the 1st of June, the plaintiff served an *amended complaint*, in which the action was set forth as founded upon a promise to pay for the same goods. On the 16th of June, the defendant served an answer, entitled "in the first action, replevin," together with a notice of trial. On the 19th of June he served another answer, entitled "in the second action, in nature of assumpsit." The plaintiff now moved to set aside the answer first served, or for other relief.

SANDFORD, J., after advising with Oakley, Ch. J., and Vanderpoel, J., granted the motion without costs, with leave to the defendant, within six days to move to set aside the amended complaint as irregular, and if that motion were granted, then the first answer to stand, and the second to be set aside.

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**BAGLEY v. G. and E. M. SMITH.**

**A notice of the entry of the judgment, given to foreclose an appeal, is a proceeding in the cause, within the meaning of an order staying proceedings on the judgment; and will be set aside as irregular.**

June 20, 1849.

AFTER a trial in this cause and a verdict for the plaintiff, the defendants on the 26th of April last, obtained and served a judge's order staying the proceedings, and granting them thirty days in which to prepare a case or bill of exceptions. On the 14th of

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The People v. Woods.

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May, the order was modified by the judge, so as to allow the plaintiff to perfect his judgment, "and all other proceedings on the judgment to be stayed." On the 18th of May, the plaintiff served on the defendants' attorney, a notice of the entry of the judgment. On the 23d of June, the defendants filed and served a notice of appeal, and gave the requisite security.

The plaintiff now moves to dismiss the appeal; and the defendant moved for an enlargement of the time, or an amendment of the notice, or that the orders to stay, &c. be deemed notices of appeal, or for relief in some other mode, if irregular.

*D. P. Hall, F. B. Cutting, and D. Lord, for the defendants.*

*J. Slosson, and E. Sandford, for the plaintiff.*

SANDFORD, J., after advising with Oakley, Ch. J., and Vanderpoel, J., held the appeal to have been made in time. The notice of the entry of the judgment was a proceeding in the cause, which was prohibited by the stay of proceedings, and was set aside as irregular, on the defendants stipulating to give to the plaintiff ten days in which to except to the defendants surties on the appeal. Leave given to the plaintiff to serve a new notice of the entry of the judgment, and his motion to dismiss the appeal denied. No costs to either party.

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**THE PEOPLE, Ex rel. RUMSEY, v. WOODS and others.**

Where after a default, the plaintiff amends his complaint, (not in mere matter of form,) he must serve the same on the defendant. A judgment entered thereon without such service, is irregular.

June, 1849.

MOTION by Woods to set aside the judgment entered against him in this suit, as irregular. The plaintiff served a summons and complaint on three defendants. Woods suffered the matter to go by default. The other two defendants demurred to the

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Smith v. Norval.

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complaint. Some months afterwards, the plaintiffs amended their complaint, in a substantial matter, and not in mere form. No copy was served on Woods, or notice given to him. Subsequently the plaintiffs proceeded to assess their damages against Woods and the others, and perfected judgment.

*J. Cook*, for Woods.

*C. C. Egan*, for the plaintiffs.

SANDFORD, J., after advising with Oakley, Ch. J., and Vanderpoel, J., said, the judgment is irregular and must be set aside. The practice contended for on behalf of the plaintiff, would be very unjust. It by no means follows, that because Woods did not defend the original complaint, that he was not desirous to answer to the complaint as amended. He should have been served with notice of the amendment so as to give him an opportunity to answer, if he were so advised.

Rule accordingly.

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SMITH and another v. NORVAL.

A bond as security for costs, conditioned that the plaintiffs shall pay to the defendants the costs which he might recover in the suit, is a sufficient compliance with the statute which requires a bond conditioned to pay, on demand, all costs that may be awarded to the defendant in such suit.

July, 1849.

APPEAL from an order at chambers, denying a motion made by the defendant to take from the files as irregular, a bond given as security for costs under an order of the court for that purpose. The plaintiffs were non-resident. The condition of the bond filed was, that if the plaintiffs should pay to the defendant the costs which he might recover in the suit, the bond should be void.

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Elson v. Equitable Insurance Company.

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*C. S. Roe*, for the defendant.

*A. Child*, for the plaintiffs.

BY THE COURT. OAKLEY, CH. J.—The statute prescribes that security for costs shall be given in the form of a bond in the penalty of at least \$250, &c., “conditioned to pay, on demand, all costs that may be awarded to the defendant in such suit.” (2 R. S. 620, § 4.) This bond, it is true, does not pursue the language of the statute, but so far as it differs, it is more favorable to the defendant than the form prescribed. The obligors will be liable immediately, if the defendant’s costs are not paid as soon as he obtains a judgment. The spirit of the statute is fully carried out by this condition, and we think it a sufficient compliance.

Order affirmed.

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ELSON v. THE NEW YORK EQUITABLE INSURANCE CO.

Where the defendant appears in the cause, though he omit to answer, he is entitled to notice of the adjustment of the costs; and a judgment entered without such notice, is irregular.

Aug. 1st, 1849.

MOTION to set aside a judgment entered by default. The defendant served notice of his appearance, with an order extending the time to answer. The latter being irregularly served, was disregarded, and the plaintiff immediately entered judgment, without giving any notice of the adjustment of the costs.

DUER, J. (The Chief Justice concurring.) Notice of the adjustment of the costs must be served in all cases where the defendant has given notice of his appearance in the action. (Amended Code, § 311, 414.) The statute requires this, and the court cannot dispense with it. The former mode of taxing costs without notice, and then giving notice of re-taxing, is no longer

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**Boutel v. Owens.**

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possible, for the judgment itself is irregular, if notice be omitted after the defendant appears in the action. The judgment must be vacated.

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**BOUTEL v. OWENS.**

**A confession of judgment, without action, is not authorized by the code, on a demand for a trespass upon real and personal property.**

**A confession of judgment, out of court, by a defendant in custody, on an arrest at the suit of the plaintiff for the cause of action confessed, made without the counsel, advice or presence of some attorney named by the defendant, and attending at his request, to inform him of the nature and effect of the confession before he signed it ; is void, and the confession and judgment will be set aside on motion.**

**Aug. 31, 1849.**

**. THIS was an order to show cause why the judgment entered by confession in this action and all subsequent proceedings, should not be set aside.**

**It appeared from the affidavits, that the plaintiff keeps a segar store in Carmine-street, and has a sign in front, a wooden figure of a woman as large as life, holding segars ; and that the defendant, who kept a grocery store directly opposite, on the 10th instant, when extremely excited by liquor, attacked the wooden figure, and mutilated it by breaking the arms and head ; and that, at two o'clock on the following morning, while still under the influence of liquor, he attacked the store of the plaintiff, breaking a panel, and otherwise injuring the outer door. Owens was immediately arrested for these outrages, and taken to the station house of the police in the vicinity, when the plaintiff agreed to settle the matter for fifty dollars, and a note was drawn and signed by the defendant for that amount, payable in six months. The police justice, however, before whom the defendant was brought, required the plaintiff to give up the note to him, and then immediately destroyed it, saying that the defendant was not in a fit condition to do business. The plaintiff then commenced a civil action against the defendant in the court**

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of common pleas, and obtained an order from Judge Ulshoeffer, to arrest and hold him to bail in the sum of \$500. Under this order the defendant was arrested and taken to the office of the plaintiff's attorney, and while in the custody of the sheriff, on the same morning, gave a confession of judgment in this court, for one hundred and seventy-five dollars, in the manner prescribed in sections 382 and 383 of the code, authorizing confessions of judgment without action. The confession was as follows, after the title of the cause:—

“Judgment is hereby confessed by me, Ferris Owens, in favor of the above named Antoine Boutel, for the sum of one hundred and seventy-five dollars, which judgment is based upon the following facts: On the the 10th day of August, 1849, I committed trespasses upon his store and personal property therein, to the amount of two hundred dollars, which damage is liquidated by the said Boutel and myself at one hundred and seventy-five dollars, that being the sum above stated, and for which I hereby confess judgment in the above entitled action or cause.

“Dated Aug. 20, 1849.

FERRIS OWENS.”

Appended to which was Owens affidavit of the truth of the statement.

The defendant now states in his affidavit, that he was at the time when he agreed to give this confession, very much alarmed and excited, that he had no legal adviser to apply to or with whom he could communicate, and was ignorant of the legal effect of the paper, and supposed that he would by signing it, obtain a discharge from the arrest. The affidavits on the other side did not deny these allegations. The attorney for the plaintiff stated that he told the defendant he had better consult some counsel before executing the paper, and that Owens left the sheriff's office, and shortly after came into the chambers of the supreme court with a man who he said was his counsel, but “whose name, place of business, and office, are unknown to the deponent; and they both read the statement or confession together, and pronounced it correct.” And the sheriff's assistant,

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in his deposition, says that *a person* with the defendant read the papers, but it was not alleged that this person was the counsel of the defendant, or that he was a counsel or attorney of the court.

It was contended by the counsel for the defendant, that the judgment was void, and ought to be set aside unconditionally, as it was confessed while the defendant was under arrest, and in actual custody of the sheriff, without the presence of any counsel attending in his behalf; and at any rate, that the court, in the exercise of its equitable jurisdiction, should allow the defendant to come in and defend upon the merits. The plaintiff's counsel contended that the plaintiff's proceedings were entirely regular under the section of the code before referred to, and that the old practice as to confession of judgment out of court, does not apply to those confessions under the code.

*H. Hunt*, for the defendant.

*C. Shaeffer*, for the plaintiff.

MASON, J.—It has long been a rule of the English courts, that no warrant of attorney executed by any person in custody of any sheriff or other officer, for the confessing of any judgment, shall be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be named by him, and attending at his request to inform him of the nature and effect of such warrant of attorney before the same is executed; and the attorney is required to subscribe his name to the due execution thereof. This rule was adopted in this form in the fourth year of George II., and it appears to have been an amendment of, or engrafted on, a prior rule, adopted in the time of Charles II. It has been constantly adhered to in England, from that time to the present. In the case of *Hutson v. Hutson*, 7 T. R. 7, the court held that a defendant, under the pressure of an arrest, ought to be considered incapable of waiving the benefit of the rule, and that in all cases he should be protected by the advice of an attorney expressly attending for him; and in the case of *Walker v. Gardner and others*, decided in 1832,

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(4 B. & Ad. 371,) the court of kings bench set aside a judgment and ordered the warrant of attorney to be cancelled, because the attorney who attended on behalf of the defendant, and witnessed the execution of his papers, was not *his* attorney, but an attorney named and procured by the plaintiff.

This rule was never adopted in terms by the supreme court of this state, but the practice of the court appears to have always been in accordance with it. This is shown by the case of *The Manhattan Co. v. Brower*, 1 Caines, 511, decided in 1804, and the case of *Evans v. Bayley*, 2 Wend. 243, decided in 1829. In the recent case of *Wilder v. Baumstauck*, 3 Howard Spec. T. R. 81, Mr. Justice Welles applied the rule to a case where a defendant confessed a judgment while in custody on criminal process, and set aside the judgment because he had no attorney attending on his behalf.

If this judgment, then, had been confessed under the old system, it would unquestionably have been the duty of the court to set it aside. And I do not see that the adoption of the code makes any difference. The code, indeed, is silent on the subject, but the code does not provide, or purport to provide, for every case. There was no statute or rule of court on this subject, under the old practice, yet the propriety of thus protecting a defendant against oppression while under arrest, was so manifest, that the court always acted on the principle of the English rule. A change in the *form* of proceeding, has not wrought any change in the *principle*. The reason of the rule still remains the same. Defendants under arrest, need the same advice, assistance and protection, whether the papers are drawn up according to the forms formerly in use, or according to the code.

The counsel for the plaintiff, contends that the code has provided for this case, and that he has strictly complied with its requirements. An examination, however, of the section relied on, conclusively shows that those sections have no application to a case like the present.

The chapter in which these sections are found, is entitled "confession of judgment without action." Now, in this case there was not only an action in the court of common pleas, but the defendant was in custody by virtue of an arrest made in the



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action, and the confession was for the same cause for which that action was brought.

Section 382, which is the first section of this chapter, defines the cases in which such a judgment without action may be entered, viz., either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both; that is, a party may confess a judgment without action, in favor of his creditor, whether the debt has become due and payable or not, and also by way of security to a person who has become surety for him, although the liability of the surety may not have become fixed, as, for instance, an accommodation indorser before the note has fallen due. These are the only cases for which this chapter provides. The next section points out the manner in which the confession in such cases must be made. Now here there was no debt and no suretyship, but a trespass. The liability was not contingent but absolute, and it was a liability not of the plaintiff to third persons on behalf of the defendant, but of the defendant to the plaintiff, for damages occasioned by the trespass.

The confession of judgment, then, in this case, was wholly unauthorized by this chapter in the code.

It is not necessary to decide in the present motion, whether, since the code, a judgment may be confessed out of court, in a case like the present. It is sufficient to say that this judgment cannot be sustained, as one *authorized* by any express provision of the code. And if a judgment by confession out of court can be given in such a case, independent of the code, the judgment in this case is void by reason of its having been confessed by the defendant while in custody of the sheriff, under an order for arrest at the suit of the plaintiff in this action, without the presence and counsel, and advice of some attorney named by him, and attending at his request, to inform him of the nature and effect of the confession, before he executed and signed it.

This view of the case renders it unnecessary to discuss the other point raised on the argument.

Judgment and execution set aside, with ten dollars costs.

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Fisher v. Curtis.

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**FISHER and others v. CURTIS.**

**PERRY v. MONTGOMERY.**

**COLE v. KERR.**

An attachment against property, under section 227 of the amended code, cannot be issued in this court, except in those actions in which the court has jurisdiction, e. g. by the residence of the defendants; or has acquired it, by the service of process on them.

An attachment against a non-resident, issued before, but served at the same time with the summons, is irregular and will be set aside.

Aug. 27; Sept.; Nov. 17; 1849.

In the first suit above, an application for an attachment was made to Mason, J., at chambers, under the fourth chapter of title seventh of the amended code. (§ 227.) The defendant was not a resident of the city and county of New York, and had not been served with the summons issued in the action.

MASON, J., after examining the provisions of the code, and showing that this court had not by the code, and had not acquired by service of the summons, jurisdiction over the defendant, proceeded as follows:

The attachment authorized by section 227 to 243, of the amended code, is a new and important remedy, which did not exist under the old system. Unlike the attachment against absent and absconding debtors, under the revised statutes, which was for the benefit of all the creditors, and as to which the jurisdiction of the justices of this court is not taken away; this attachment is for the benefit of the individual creditor. It is requisite, however, in order to its being issued, in every case; 1st. That there should be an action pending; by § 227, the attachment is authorized only *in an action*, and by § 99, an action is not commenced for any purpose until the complaint is verified: 2d. It must appear among other things required by § 229, that the defendant is either a foreign corporation, or not a

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Fisher v. Curtis.

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resident of this state, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

Where a debtor whose place of residence is *in this city*, absconds from the state, or conceals himself within the same, to avoid the service of the summons, then this court has jurisdiction to issue the attachment, because it can entertain the action. So also in the case of a non-resident debtor, who may have been served with process in the city; because then the court has jurisdiction of the case by the actual service of the summons. But when a debtor is a non-resident, and the summons cannot be served on him, this court cannot issue the attachment, because it cannot entertain the action.

The application must be denied.

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In *Perry v. Montgomery*, Sept. 1849, an attachment was issued before the service of the summons, against a non-resident of the city. It was served with the summons, and a motion was made to set it aside.

SANDFORD, J., after advising with Oakley, Ch. J., and Vanderpoel, J., held that the attachment was irregular, and ordered it to be set aside.

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In *Cole v. Kerr*, Nov. 17, 1849, which was precisely similar in its circumstances, except that after the service of the summons and attachment, the defendant put in an answer;

OAKLEY, CH. J., after consulting with Vanderpoel and Sandford, J. J., held that the attachment was irregular, and must be set aside. He said this did not affect the continuance of the suit, nor the issuing of a new attachment.

**STANTON v. THE DELAWARE MUTUAL INSURANCE COMPANY.**

The provision of the amended code of procedure, for the inspection and taking copies of books, papers, &c, does not repeal the provision of the revised statutes relative to the production of books and papers.

To obtain an order for a discovery under the latter, to aid in preparing an answer, the petition must show the nature of the document and its necessity for that purpose.

Sept 27, 1849.

*T. Sedgwick*, for the defendants.

*C. B. Moore*, for the plaintiff.

**BY THE COURT.**—This is a suit on a policy of insurance on a vessel claiming for a total loss, or in a certain alternative, for a partial loss. There was as it is alleged, a technical, but not an absolute total loss. No answer has been put in. The defendants present a petition for a discovery, to enable the party to answer, which presents the question, whether this proceeding to compel a discovery under the revised statutes, is not repealed by the provision on that subject in the code?

We have looked into the subject, and will state our conclusion. The practice under the rules of the old supreme court, and in this court, was assimilated. The course was to present a petition, setting forth the nature of the case and the occasion of the discovery, with a certificate of counsel, that the discovery was necessary. This court in carrying into effect those rules, early came to the determination, that it would not, in ordinary circumstances, permit an inspection, or order a deposit of books or papers; unless there was a charge of forgery, or some similar pressing reason existed for directing it. We thought a contrary practice would be liable to very great abuse. Our practice was, to order sworn copies, which usually answered all the objects of the law, which was to enable the adverse party to prove the contents of his opponent's books, or of papers in his possession. In every such instance, the other party could produce the original document on the trial, and then the copy would not be used.

The code originally provided a rule for the inspection of papers, which was not very broad. It gave a right to take a copy, which implied an inspection of the original. If compliance with the order were refused, the court might exclude the paper from being given in evidence, or punish the party refusing, or both. The amended code extended the provision to books and documents, still giving the right to a personal inspection, and to take a copy. (Sect. 388.) The codes differed essentially from the revised statutes in this, that by the latter, copies were not to be taken, (involving an inspection,) except under an order of the court; and the court in the discretion it thus exercised, would not, except in very rare cases, direct it.

Now, does the provision of the code repeal the revised statutes as furnishing a remedy inconsistent with the former? We think not. The two systems may well stand together. If a party come by petition under the revised statutes, and ask for a discovery, he has a right to it. It is a different proceeding from that under the code. The court exercises different powers in respect of it, having a discretion as to the manner of ordering it, and there being provided a different mode of enforcing the discovery. There is no incongruity between the two systems, and they may stand together.

The new rules of the supreme court show the court did not deem the code to have superseded the old system. That court has made rules which carry out the latter, in respect of sworn copies and the like. The application before us comes under the old system. There is not enough in the papers, to show why or how it is necessary to have the discovery asked, in order to prepare the answer. This should be shown, as well as the nature of the documents.

Application denied.(a)

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(a) In the case of *Moore v. Pentz*, President of the Mechanics Banking Association, an order had been made for the inspection of certain books of the bank. On an application founded on an alleged compliance with the order before Mason, J., he delivered the following opinion on the point above decided. The decision in the principal case was not mentioned on the argument.—See the next page.

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Stanton v. Delaware Mutual Ins. Co.

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## MOORE v. PENTZ.

*W. M. Evarts*, for the plaintiff.

*R. E. Mount, Jr.*, for the defendant.

MASON, J.—(*April 8th*, 1850.)—The power of the court to require the production of the books, is undoubted. The statute (2 R. S. 199, § 21,) gives the court the power to compel any party to a suit, to *produce* and discover books, &c. The next section directs the court to prescribe, by general rules, the cases in which such discovery may be computed, and the *proceedings* for that purpose. And the tenth rule of the supreme court, which is, also, by statute, the rule of this court, framed in pursuance of this direction, provides that the order granting the discovery, shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed by the court. One object in requiring the deposit to be made with the clerk of the county in which the trial is to be had, undoubtedly is, that the books may be within reach, to be produced on the trial, if necessary. The same object will be effected in this case, by requiring the defendant to produce them on the day of trial, and deposit them with the clerk of this court, to remain with him during the trial of the cause; and such is the order of the court, with regard to the books mentioned in the plaintiff's notice.

The powers of this court, under the statute, being amply sufficient to warrant the order. I have not considered the other point suggested by the counsel for the plaintiff, viz. whether this court has now all the powers on this subject formerly possessed by the court of chancery? That question may become important, if the books should not be produced, and the counsel for the plaintiff should not deem the consequence of non-production given by the 20th section of the statute, to be sufficient to enable him to recover, but should desire to compel the actual production of the books in court. But at present it is unnecessary to discuss that point.

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Wood v. Harrison.

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## WOOD v. HARRISON and MONTCRIEFF.

Trial of an equity suit before a jury under the code, where the defendants rights were distinct, &c.

Oct. 25, 1849.

AT *nisi prius*.—The complaint set forth that the plaintiff at a receiver's sale, on the 2d of November, 1848, became the purchaser of the leasehold interest of one Britton, in the premises known as No. 10 Dey street. That the receiver making the sale, was vested with all the right which Britton had on the 22d day of April, 1848; the same having been transferred to such receiver in a creditor's suit in equity, commenced on the day last mentioned, by J. E. and C. Andrew against Britton, upon a judgment and unsatisfied execution. That the sale was made in pursuance of an order of the court, and a conveyance executed by the receiver to Wood.

The complaint further stated, that early in 1847, Britton obtained a lease of No. 10 Dey street from the owners, for a term of ten years from the 1st of May, 1847, at the yearly rent of \$700, on condition that the defendant Harrison would become his surety for the rent. Harrison agreed to be such surety, if B. would assign him the lease as security. Accordingly, the lease was executed to Britton, Harrison executed a covenant to the lessors to pay the rent, and B. assigned the lease to Harrison, as his security therefor. That on the 26th of August, 1848, Harrison leased the premises to the defendant Montcrieff, for the residue of the term demised to Britton, and put M. in possession. That M. had full notice of Andrew's suit against Britton, and of their claim to B.'s interest in the lease. That Britton took possession May 1st, 1847, and continued in possession until after Andrew's suit was commenced. That on the 18th of November, 1848, the plaintiff offered in writing to Harrison, to substitute good and sufficient security in his place on Britton's lease, (and stated that the lessors would accept the same,) if he would assign the lease to the plaintiff. That Harrison positively refused to assign the lease upon any terms.

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Wood v. Harrison.

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The complaint prayed that the defendants might assign to the plaintiff, the lease and all the right which they and Britton had therein, and give the plaintiff possession of the premises; on his furnishing to Harrison a release and discharge of his suretyship and liability for the rent, and procuring a responsible person to become surety upon the lease in his stead. And for such other or such further relief, as the nature of the case might require, and to the court should seem meet.

The defendant Harrison, in his answer, stated that he refused to become security for the rent, unless he should have the absolute control and ownership of the lease; and that the lease having been executed before Britton had applied to him, he signed the covenant, and at the same time received from B. an absolute assignment of the lease. That Harrison was in truth the lessee, and that Britton never had any actual interest in the premises, and he never had the possession of the lease. That the lessors have refused and do refuse to change the security, and to accept any person in place of H. as covenantor for the rent. That the plaintiff has no right, title or interest in the lease. That the court has no power to compel the lessors to substitute another person as security; and certainly not, without making them parties to the suit. Nor can the court compel the defendant to assign the lease and give possession to the plaintiff; because he has transferred all his interest to Montcrieff, who is in possession and entitled to the lease.

The answer of the defendant, Montcrieff, set up that he obtained his lease from Harrison, in good faith and without any notice of the facts relied upon in the complaint to sustain the plaintiff's title. It also put in issue those facts.

On the trial, before SANDFORD, J., the respective parties gave evidence in support of their claims as made by the pleadings, and the plaintiff proved that if Harrison had assigned the lease to him when requested, he could have sold it for \$500.

After the cause was summed up to the jury, the judge submitted to them in writing, six questions, as embracing all the material issues, and desired their answer to each. The questions, with the answers made by the jury after retiring and deliberating, were as follows:



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Partin v. Elliott.

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1. Was Britton the principal and Harrison the surety, in the lease when it was executed? (Answer, They were.)

2. Was the assignment from Britton to Harrison, intended to be absolute; or was it made as security to Harrison, in respect of his covenant to pay the rent? (Answer, As security.)

3. Did the lessors in the lease, give their consent to release Harrison from his covenant, and accept some other surety, or will they now release him? (Answer, No.)

4. Did the tenant Montcrieff, when he received his lease from Harrison, have any knowledge or information that Harrison was a surety or trustee for Britton? (Answer, No.)

5. Did Montcrieff then have any knowledge or information as to Andrew's proceedings against Britton, and his claim to enforce his judgment against the lease of No. 10 Dey street? (Answer, No.)

6. What was the lease worth when the offer was made by Wood to Harrison, to substitute other security? (Answer, \$500.)

The Judge, after hearing counsel as to the judgment to be given on the verdict, gave judgment for the plaintiff against Harrison, for \$500, and the plaintiff's costs of the suit; and in favor of Montcrieff against the plaintiff for his costs.

*D. Evans and E. Sandford*, for the plaintiff.

*H. Hilton and J. Cochran*, for the defendants.

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PARTIN v. ELLIOTT & THACKSTONE.

TAGGARD v. GARDNER.

A party may be examined as a witness at the instance of the adverse party, in all cases, after issue and before the trial, upon an order of a judge; without the existence of any circumstance which would authorize a commission or an examination conditionally under the revised statutes.

Such examination may be had, on five days notice requiring it, without any order of a judge; the party being subpoenaed and paid his fees as a witness.

Nov. 14, and Dec. 1849.

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Partiu v. Elliott

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ORDER in the first case for the examination of the defendants as witnesses for the plaintiff. The cause was at issue and ready for trial. The defendants attended and objected to the order, as not warranted by the code. That the party cannot be examined as a witness *before the trial*, except on a commission, where he resides out of the state, or *conditionally* on the grounds prescribed for taking testimony conditionally in the revised statutes.

*C. E. Appleby*, for the plaintiff.

*W. Bliss*, for the defendant.

SANDFORD, J., (after advising with his associates,) directed the parties to submit to the examination. He said, it is difficult to give any satisfactory operation to the word "conditionally," in the 390th section of the amended code. It clearly does not mean that the party cannot be examined before the trial, when residing here, in no other cases than those in which a witness may be examined conditionally by the revised statutes; because the 391st section is positive and express, that the examination may be had before the trial, *at the option of the party claiming it*. Moreover, an examination at the trial, does not seem to be contemplated, after such an examination as that now ordered. This proceeding is expressly "*instead of being had at the trial*," and the examination may be read by either party on the trial. (§ 392.) The object which the commissioners on practice and pleadings had in view, in reporting what is now section 391, can only be attained by giving to it the construction for which the plaintiff contends. The examination before the trial, was designed to aid parties in preparing for trial; irrespective of the residence of the party sought to be examined, or the probability of his being able to attend the trial. (Commissioners First Report, 1848, pages 244, 245.) The 290th section contains in a condensed form, the provisions of the first section of the act of December, 1847, authorizing parties to examine their opponents as witnesses. (Laws of 1847, Ch. 462, page 630.) In adding the further provisions contained in section 391, the function of

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**Merchant v. The N. Y. Life Insurance Co.**

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the word "conditionally," was in a great measure, if not wholly superseded.

Order accordingly.

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In *Taggard v. Gardner*, in December 1849, the plaintiff had given the defendant, who resided in the city of New York, five days notice, requiring him to appear before a justice of this court at chambers, and be examined previous to the trial, as a witness in the cause. No order of the court had been obtained for that purpose, but the defendant was regularly subpoenaed to attend at the time and place specified in the notice, and was paid his fees for attending as a witness. The defendant denied the right of the plaintiff to compel him to testify in this manner, and insisted that an order of the court was indispensable.

SANDFORD, J., (after conferring with the Chief Justice and Vanderpoel, J.,) decided that the plaintiff's proceeding was regular, and the defendant must submit to the examination. He said a previous order from a justice of the court was not necessary, unless a shorter time than five days be for some cause desirable and proper. If the party notified and subpoenaed, having a reasonable time given to him, fail to attend, he will be liable to punishment as for a contempt of court.

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**MERCHANT v. THE NEW YORK LIFE INSURANCE COMPANY.**

The complaint may be amended in the amount claimed by the plaintiff, in an action on contract for the recovery of money only, even after a reply repeating the original claim, and both pleadings verified.

Nov. 14, 1849.

THE court decided that in a proper case, the complaint may be amended in the amount claimed in an action on contract for the recovery of money only. The cause was at issue; the plaintiff in his reply, having reiterated the claim and the amount, as in his complaint.

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Castellanos v. Beauville.

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Both pleadings were verified by the plaintiff. On his applying for a discovery of books and papers, the defendants, (who had in the meantime been examining their books to ascertain the amount due to him,) sent to his attorney a stipulation that he might take judgment for the amount of his claim. The plaintiff persisted in his demand for a discovery, and stated in his affidavits, that on examining certain statements made by the defendants, he had ascertained that there was due to him more than twice the amount claimed in the complaint. That these matters were exclusively within the defendants' knowledge, and he never had any means of knowing how much was due to him, except from their books and the published statement of their affairs.

The plaintiff avowing his intention to move to amend his complaint, the question as to the power to amend in respect of the amount claimed, was fully argued on the motion for a discovery.(a)

*R. Dodge*, for the plaintiff.

*W. Bliss* and *O. Bushnell*, for the defendants.

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CASTELLANOS v. BEAUVILLE and others.

Where in trespass, separate defences are made by several defendants, in good faith, and not for costs, each is entitled to a full bill of costs on succeeding in the suit.

Where, after being commenced separately, the defences are united under the same attorney, or are in truth and effect united, during the residue of the suit, there can be but one set of costs for all.

Nov. 17, 1849.

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(a) Reference was made to sections 128, 129, 142, 169, 246, 247, 275 and 276, of the amended code ; and to the First Report of the Commissioners on Practice and Pleadings, p. 195.

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*Castellanos v. Beauville.*

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**TAXATION OF COSTS.**—The suit was trespass, against Beauville, Samanos, and W. Jones, sheriff. The latter appeared by his attorneys, Messrs. Brown & Matthews, and put in a plea. Beauville and Samanos appeared, and put in a joint plea by W. Skidmore, their attorney. The defence of B. and S. was jointly conducted until the second trial, when Samanos was acquitted. At that stage of the matter, Brown & Matthews became Beauville's attorneys, on a substitution for Skidmore, and conducted the suit till its termination in a judgment for all of the defendants. On taxing the costs, a full bill was claimed for each defendant.

*Brown & Mathews*, for the defendants.

*H. P. Hastings*, for the plaintiff.

**BY THE COURT.** OAKLEY, CH. J.—The defences of Beauville and Samanos were conducted by the same attorney, and on the same plea while S. continued in the suit, and there can be only a single bill of costs for both during that period. After that, the defence of Beauville and the sheriff was conducted jointly by the same attorneys for both. It is not the case, therefore, of a separate defence by separate attorneys. There separate bills are allowed, where the defences were so conducted in good faith, and not for costs. Where in truth and in effect the defences have been united, there can be only one bill taxed. The result is, there must be one full bill of costs taxed for the sheriff, and another for Beauville and Samanos, to the period when the sheriff's attorneys became the attorneys for B. No costs will be taxed to B. after that, as there was thereafter one entire defence for him and the sheriff.

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Southart v. Dwight.

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**SOUTHART v. DWIGHT.**

Where a discovery is sought of a paper, stated on oath to have been delivered to the adverse party ; to excuse himself from discovering it, he must swear, positively, that it is not in his possession or under his control ; or must state facts, which with his denial on his knowledge, information and belief, are equivalent to a positive negation on oath.

Dec. 1849.

THIS was an application by the plaintiff, for an order on the defendant, to discover a certain receipt. The affidavit of the plaintiff, made in support of the application, averred positively, that he had made and signed the receipt in question, and had delivered it to the defendant. The application was opposed, and an affidavit of the defendant produced, in which he swore that he had no recollection of such a receipt, that he had searched for it, but without finding it, and that he believed it was lost or mislaid, and to the best of his knowledge and information, no such receipt was in his possession, or under his control.

SANDFORD, J., (after advising with two of his associates,) held that the affidavit of the defendant did not make a sufficient answer to the application of the plaintiff. A party, to excuse himself from making a discovery of any papers alleged on oath by the adverse party, to be in his possession, must make an affidavit in the terms prescribed by the revised statutes, and swear positively that the papers are not in his possession, or under his control. He must make such an examination as to enable him to do this ; or state facts with his denial when expressed as it is here, which will show that such denial is equivalent to the positive oath required by the statute.

APPLEBY v. ELKINS.

Form of complaint on a promissory note by indorsee against maker, approved on demurrer.

On overruling a demurrer to a complaint as frivolous, leave to answer will not be given, without an affidavit of merits.

December Special Term, 1849.

DEMURRER to a complaint. The statement of the complaint was as follows :

“That the defendant on the first day of August, 1849, made his promissory note in the words following:—‘New York, August 1st, 1849. Two months after date, for value received, I promise to pay to the order of Noah Ripley, one hundred and sixty dollars. G. B. Elkins.’ And delivered the same to the said Noah Ripley, who thereupon indorsed the same to the plaintiff; that the said defendant did not pay the said note when it became due, and that the defendant is indebted to the plaintiff upon the same note in the sum of \$160, besides interest.”

The defendant demurred, for the following causes :

“1st. That the complaint does not show that the plaintiff is the lawful holder of the note on which the action is brought. 2d. It is not averred that the said note is due. 3d. The complaint does not state facts sufficient to constitute a cause of action.”

The plaintiff moved for judgment, on the ground that the demurrer was frivolous.

*C. E. Appleby*, for the plaintiff.

*J. N. Balestier*, contra.

THE COURT, (SANDFORD, J.,) held the demurrer to be frivolous, and directed judgment for the plaintiff. There being no affidavit of merits, leave to answer was refused.

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Hartwell v. Kingsley.

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## HARTWELL v. KINGSLEY.

Where a defendant moves to dissolve an injunction on his answer only, without relying upon affidavits in addition thereto; the plaintiff cannot read in opposition to the motion, his reply verified, or any affidavits other than those upon which the injunction was granted.

December, 1849.

MOTION to dissolve an injunction, made upon the sworn answer of the defendants.

*E. W. Stoughton*, for the defendant.

*L. S. Ashley*, for the plaintiff.

SANDFORD, J.—The plaintiff seeks to read his reply duly verified, and sundry affidavits recently made, in opposition to the motion to dissolve the injunction which is founded upon the answer only. It is true the answer must be sworn, in order to move upon it; but it is nevertheless *the answer*, and the application to dissolve, is not made upon *affidavits* on the part of the defendant, within the meaning of section 226 of the amended code. The previous section shows clearly, that the answer is a document entirely distinct from the affidavits, upon which with or without the answer, the motion to dissolve the injunction may be made. The answer cannot be used at all in support of the motion, unless it be verified; so that when the code here speaks of an answer, it means a sworn answer. The plaintiff therefore, by the express terms of the 226th section; is precluded from opposing the motion by affidavits or proofs in addition to those on which the injunction was granted.(a)

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(a) This point was so ruled by the whole court in March 1849, on an appeal from an order at chambers, in the case of ——— v. *Barker*. See to the same effect, ruled in the supreme court in this district by Hurlbut and Edwards, J. J., *Servoss v. Stannard*, 2 Code Reporter, 56. •



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Florence v. Bates.

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## FLORENCE v. BATES.

On a motion to shew cause why an injunction should not issue, the defendant may read in opposition to the motion, the affidavits of third persons, although he has put in his answer denying the whole merits of the complaint. The answer in such case is only used as an affidavit.

The rule adopted in Maryland, and some other states, that on a motion to dissolve an injunction, if the equity of the case made by the bill is not denied, but new matter is set up in avoidance which is a complete defence to the action, the court cannot regard such new matter, but must continue the injunction to the hearing, has not been adopted in this state. *Semble.*

It is also contrary to the practice in England, where a defendant is entitled to a dissolution of the injunction as a matter of course, upon the allowance of a plea to the whole bill. *Semble.*

January, 1850.

THE facts of this case are sufficiently stated in the opinion.

*C. F. Grim*, for the plaintiff.

*J. T. Brady* and *John Graham*, for the defendants.

MASON, J.—The plaintiff in this case brought his complaint for an injunction, to restrain the defendant from darkening his windows, by the erection of a building, and also from selling liquor on his premises, contrary to the covenants contained in an agreement made between the defendant and the assignor of the plaintiff.

An ex parte application having been made to a justice at chambers, upon the matters stated in the complaint, he directed notice to be given to the defendant to show cause why the injunction prayed for should not issue, and granted a temporary injunction in the mean time.

The defendant on the return of the order, showed cause by his answer to the complaint, duly verified, and also by the affidavits of several persons in support of the answer, and the motion has been argued at length by the respective counsel. The questions raised on the argument were principally those of practice,

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Florence v. Bates.

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some of which have never been, as far as I can discover, settled in this state.

The plaintiff's counsel in the first place, objected to any affidavits being read in support of the answer. That objection, however, is overruled by the case of the *Village of Seneca Falls v. Matthews*, (10 Paige, 504,) in which the chancellor expressly held, that in a case like the present, upon an order to show cause why a preliminary injunction should not be granted, whether a temporary injunction is or is not allowed in the meantime, the defendant has a perfect right to introduce his own or any other affidavits for the purpose of showing that the injunction should not be granted as asked for, and that he may use such affidavits in a case of that kind, although he had put in his answer, denying the whole equity of the bill, or has neglected to answer the bill fully, so that his answer may be excepted to for insufficiency ; for the answer, he adds, in such a case is only used as an affidavit on the part of the defendant, in opposition to the complainant's application.

The plaintiff's counsel next insisted that he was entitled to the injunction, because the facts on which the equity of the bill rests were not denied by the answer, and contended that on this motion the court could not regard matter in avoidance, set up in the answer and supported by the affidavits, however conclusive such matter might be against the plaintiff's right, but the defendant must continue under injunction until the hearing. And the cases cited by the counsel from Maryland, certainly support the proposition. In the *Bellona Company's case*, (3 Bland Ch. R. 442—445,) it is stated by the chancellor, to be "a well established rule, that on a motion to dissolve an injunction, the defendant can only ask for a dissolution, upon so much of his answer as is properly responsive to the bill ; no new matter in avoidance, making its appearance for the first time, can in this stage of the cause, be allowed to form any part of the defendant's motion for a dissolution. It is a direct and responsive denial of the facts composing that case, on which the plaintiff's equity rests, which *alone* can entitle the defendant." The same doctrine is held in other cases reported in the Maryland reports, and also in *Linsey v. Etheridge*, (1 Dev. & Battle's R. 38.) With all

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Florence v. Bates.

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due respect to these authorities, I confess myself so dull as not to see the force of their distinction. If a defendant in answer to a bill asking for an injunction against the violation of a covenant alleged to have been entered into by him, should deny that he executed the covenant, the injunction according to these cases would not be granted, or if granted, would be dissolved. If, however, he should admit that the covenant had been made, but should set up a release by the plaintiff, so that it was no longer in existence, the injunction must be granted, or if granted, continued till a final decree. What greater potency or virtue there is in an oath denying an allegation, than in an oath confessing and avoiding it, I cannot divine.

Such a doctrine has never, I believe, been held in this state. There is indeed a dictum to that effect by Chancellor Kent, in *Minturn v. Seymour*, (4 J. C. R. 499,) in which that eminent judge says of the answer in that case, that it endeavored to strengthen the defendant's case by the introduction of new matter, and if the defence rested on such new matter, and had admitted the equity set forth in the bill, then according to the reason of the thing, and the general rule declared in *Allen v. Crobroft*, (Barnadiston Ch. R. 373,) the injunction ought to have been continued to the hearing. "But in this case," he added, "the equity of the bill is denied." The case from Barnadiston was cited on the argument of this motion, and fully bears out the position contended for. Chancellor Bland, in *Simon v. Clagget*, (3 Bland. Ch. R. 162,) remarked that he was inclined to believe that this very case had been mainly instrumental in establishing the rule in the court of chancery in Maryland. But he also remarked, that the rule was not mentioned in any English abridgment, digest, compilation or book other than that book, wherein the case referred to is reported, and he referred to Lord Mansfield's celebrated condemnation of the book, as reported in *Zouch v. Woolston*, (2 Burrows, 1142.) The reporter says "Lord Mansfield absolutely forbid the citing that book, for it would only be misleading the students to put them upon reading it. He said it was marvellous, however, to those who knew the Sergeant, and his manner of taking notes, that he should so often stumble upon

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Florence v. Bates.

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what was right ; but yet that there was not one case in his book which was so throughout."

The case in Barnadiston is not only unsupported by any other English authority, but is also in opposition to the principles of the English decisions on this point.

Thus it is well settled in England, that if a plea to the whole bill be allowed, the plaintiff may move for a dissolution of the injunction, because a plea allowed is to be considered as a full answer. (*Drewry on Injunctions*, p. 411. 3 Daniel's Pr.) But a plea allowed is an admission of the facts alleged by the plaintiff in his bill, and that they would be a sufficient foundation for a decree, but for the new matter set up in the plea. The defendant is not compelled, however, to wait until he has proved his plea ; he is entitled to a dissolution of the injunction, as soon as the court have decided that the plea, *if true*, is a good defence to the action ; and by parity of reasoning, if the defendant set up his defence by answer instead of by plea, he is equally entitled to a dissolution of the injunction, or to prevent its being issued, upon the court being satisfied that the matter set up in the answer, if true, would constitute a good defence. Since then, we find the established rule with regard to pleas, to be such as I have stated, and the English authorities, with the single exception of the case from Barnardiston, make no mention or the distinction taken in the American cases above cited, between a simple denial of the case made by the bill and matter set up in the answer by way of avoidance ; I think I am justified in saying, that the rule contended for by the plaintiff, is without precedent in England, and he has failed to show any precedent in this state.

I shall, therefore, for the purposes of this motion, take into consideration the matters set up by way of avoidance of the complaint, in the answer and the accompanying affidavits. It will be perceived I have, in the examination of this question, considered the rule to be the same, whether the application is on the part of the plaintiff for an injunction, or on behalf of the defendant for the dissolution of one already granted. The same principles govern either mode of presenting the question.

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Engle v. Bonneau.

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ENGLE v. BONNEAU.

An execution may be returned in less than sixty days, and whenever returned unsatisfied, the creditor may proceed under section 292 of the code, without regard to the period it was in the sheriff's hands.

If the debtor show any fraud or collusion in omitting to levy on property, the court will take care the fraud is not effectuated.

The execution must be actually returned by the sheriff, before the supplementary proceeding can be commenced.

No costs to a defendant on this proceeding, on his procuring it to be dismissed, without an examination.

Dec. 27, 1849.

THE defendant appeared pursuant to an order of one of the justices of the court, issued upon a proceeding supplementary to the return of an execution unsatisfied. The affidavit on which the order was obtained, stated that the sheriff had returned the execution. It was shown, however, that it had not been filed when the order was made. On this and several other grounds, the defendant moved to dismiss the proceedings with costs.

*Western and Coren*, for the plaintiff.

*B. L. Billinge*, for the defendant.

SANDFORD, J.—It is objected that a party cannot proceed under section 292 of the code, until after the expiration of the sixty days during which an execution may run; although the execution be in fact returned unsatisfied and filed. This is insisted in analogy to the established practice on creditor's bills in the late court of chancery. (3 Paige, 311.)

The code is consistent with the course pursued by the plaintiff here, who had his execution returned in thirty days after it was issued. I have advised with my associates, and my conclusion, I am authorized to say, is theirs also. We desire to establish a uniform practice on the subject, and we find that this course is sanctioned, both in the supreme court and the common pleas in this city. For the decisions in the supreme court we refer to 1 Code Reporter, 107, note.

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*Corlies v. Delaplaine.*

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It may, therefore, be deemed the established practice in this court, that whenever an execution has been regularly issued and returned unsatisfied, the creditor may proceed against the judgment debtor's things in action, under section 292 of the code; without regard to the time during which the execution was in the hands of the sheriff. If collusion or fraud in making the return, or in omitting to levy upon property, be shown, the court will take care that the proceeding shall not be made an instrument to carry the fraud into effect.

The averment as to things in action, &c., expected to be reached by this examination, is one required by the practice of the court. It is not a statutory provision, and it may now be supplied by a supplementary affidavit.

There is, however, a fatal defect in the plaintiff's proceedings, in the fact that the execution was not actually returned, until several days after the order for the defendant's examination was made.

The order must be discharged, but without costs. The 301st section does not give the defendant costs in these cases, unless he has been examined.

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*CORLIES v. DELAPLAINE.*

A motion to strike irrelevant or redundant matter out of a pleading, will not be granted, where the party before moving, answers or replies to such pleading.

January 15, 1850.

MOTION to strike irrelevant matter out of an answer. It appeared that before moving, the plaintiff had replied to the answer.

*M. Porter*, for the plaintiff.

*J. F. Delaplaine, Jr.*, for the defendant.

SANDFORD, J., after advising with Oakley, Ch. J., and Paine, J., denied the motion, because the plaintiff had put in a reply

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Droz v. Lakey.

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before he gave notice of his application. He said it was deemed best to require the party to object promptly, to matter alleged to be redundant or irrelevant; and answering the pleading should be considered as a waiver of such objection.

Motion denied.

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DROZ v. LAKEY and PINE.

A party obtaining a verdict, is not bound to wait four days before entering and perfecting his judgment.

The four days mentioned in the code, after which judgment becomes final, are intended to enable the losing party to obtain a stay of proceedings, in reference to a case.

If he obtain an order staying proceedings within the four days, he may move to set aside the verdict as against evidence, notwithstanding the entry of the judgment.

Jan. 19, 1850.

APPEAL from an order of a justice at chambers, denying a motion to set aside a judgment.

In two days after a verdict for the defendants, they proceeded to enter and perfect judgment. The plaintiff desiring to move to set aside the verdict as against evidence, obtained an order to stay proceedings on the second day, but after the entry of judgment, and subsequently prepared a case.

Insisting that judgment could not be perfected until the expiration of four days from the entry of the verdict, and of the direction of the court for judgment thereon, he moved to set aside the judgment as irregular. He contended that unless it were set aside, he could not make his motion for a new trial.

*B. F. Winslow*, for the appellant, cited Amended Code, sections 264, 265, 269, 280, 281, 323; Graham's Pr. 296, 336 to 338; 1 Wend. 31.

*W. E. Curtis*, for the defendants, referred to section 220 of  
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Anon.

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the original code, section 281 of the amended code, and 1 Code Reporter, 125.

**BY THE COURT.**—Upon the rendition of a verdict, the justice who tries the cause directs an entry of the judgment to be rendered thereon, unless he desires to consider the matter further. And judgment shall be entered by the clerk, in conformity to the verdict, which shall be final after the expiration of four days, unless there be an order reserving the case or staying the proceedings. (Amended Code, § 264, 265.) The clerk is to make up the judgment roll immediately after entering the judgment. (Ib. § 281.) This is restricted in effect by the two days previous notice required for the adjustment of the costs.

We think the intent of section 265, was not to delay the entry of the judgment, or its completion in form, until after the expiration of four days; but that a judgment so entered and completed, will become absolute and final, unless before the end of four days, the losing party shall obtain from the court or a justice, a stay of proceedings. If he desire to move for a new trial on the ground that the verdict is against evidence, he may obtain a stay for that purpose within the four days, and then move at special term on a case. If his motion be granted, the judgment never becomes final, and will be vacated of course. The defendants have been regular, and the plaintiff must be content with the order at chambers which preserves all his rights.

Appeal dismissed.

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ANON.

On an appeal from chambers, the court decided that on a motion to strike matter out of a pleading as irrelevant, redundant or frivolous, it would be governed by the consideration whether it was in any way questionable as to the matter being good in point of law. If there were any reasonable doubt as to the



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Ring v. Mott.

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matter being pertinent, the court should put the party to his demurrer. In respect of matter palpably redundant or frivolous, the court will strike it out of course.

January 26, 1850.

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RING v. MOTT.

The issuing of a commission to take the testimony of a witness out of the state, though usually directed, is not a matter of strict right.

Where a commission is likely to produce great injury to the adverse party, terms will be imposed, and in extreme cases it may be wholly refused.

January 26, 1850.

APPEAL from an order at chambers, denying a motion of the plaintiff for a commission. The action was of an equitable nature. A brother of the plaintiff, whose family resided in New York, and who was an officer of the customs here, left home for the island of Cuba in October, 1849, for the benefit of his health. Previous to his departure, the plaintiff proceeded to examine him conditionally, but the cross-examination, which was very long, had not been completed, when he was obliged to leave.

The commission was opposed, on the ground that the witness was a resident of the state; and because, as stated in affidavits, his cross-examination required the presence of numerous books of account and valuable vouchers, which it was impossible to send to Cuba and produce to him there; and the omission to have the witness examined upon them, would be dangerous to the defendant's rights.

*J. I. Ring and O. Hoffman*, for the plaintiff.

*R. H. Bowne and W. C. Wetmore*, for the defendant.

BY THE COURT.—The issuing of a commission is in the discretion of the court. It is usually done as of course, with or

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Hill v. Muller.

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without a stay of proceedings, but it is not a matter of strict right. The court must be governed in the exercise of its discretion, by what it is apparent will be the consequences; and if it is evident that great injustice will be likely to ensue to the adverse party, it is far from being of course to grant it. In such a case, the court will either impose terms so as to preserve the rights of the adverse party, or will even refuse it, if no way for their protection can be devised.(a)

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HILL v. MULLER.

Where an answer to the allegations of the complaint or some of them, might subject the defendant to a criminal prosecution, he need not admit or deny such allegations on oath. He must put in a sworn answer, in which he may state, that by answering on oath the particular allegations specified, he may subject himself to a criminal prosecution; and as to the residue of the complaint, he will answer in the usual manner. Such an answer will be deemed to put in issue the allegations of the complaint which the defendant excuses himself from answering.

February, 1850.

THE facts sufficiently appear in the opinion of the court.

MASON, J.—This is an action for assault and battery. The complaint is verified, and the plaintiff requires an answer under oath. The defendant applies for leave to put in an answer without oath, on the ground that an answer under oath might subject him to a criminal prosecution.

The 133d section of the code of 1848, required all pleadings to be verified by the oath of the party or his attorney, except where the party would be privileged from testifying to the same matter, in which case the verification might be omitted; and it also declared that no pleading if verified, should be used in a criminal prosecution against the party as proof of a fact admit-

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(a) The cause stood over to enable the parties to make an arrangement.

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Hill v. Muller.

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ted or alleged in such pleading. If this section were still in force, the defendant would be excused from verifying his answer, since there is no rule better settled than that a witness cannot be compelled to criminate himself. The principle of the rule has also been incorporated in the constitution of 1846, which provides that no person shall be compelled in a criminal case to be a witness against himself. The constitution of 1821 contained a similar clause.

In the amended code, however, this protection to the rights of parties has not been inserted, and the counsel for the plaintiff insists that the legislature intended by this omission to compel a defendant in all cases to answer the specific allegations of the complaint, under oath, when the complaint had been sworn to, and that without regard to the question whether the answer would or would not criminate the party. If he is right in this position, it would be in the power of the plaintiff to deprive his adversary of the benefit of this most salutary rule. Such, however, could not have been the intention of the legislature; and we ought not so to interpret their meaning as to bring it in conflict with the terms or spirit of the constitution, if it is susceptible of a construction in harmony with both; and we apprehend that the legislature did not intend to interfere in the least with the principle that a man cannot be obliged to criminate himself. That had been settled by higher authority. All they meant to say was, that a party who wishes to avail himself of such a defence, or rather excuse, must do so under the sanction of an oath. He is not precluded from saying that an answer to the whole or any particular allegation of the complaint may subject him to a criminal prosecution, but if he does offer that excuse, he must verify it by his oath. This would be in analogy to the doctrine of courts of equity, from whence many of the principles of pleading adopted in the code, are taken. It is the established rule in those courts, that answers and pleas, except in some few cases, must be verified by the oath of the party, unless the complainant expressly waives the oath; yet it has always been held, that a defendant could plead that an answer might subject him to a criminal prosecution, or might set up the same excuse in his answer. Such

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**Washington Bank v. Palmer.**

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a plea or answer, however, does not deprive the plaintiff of the relief he asks ; its only effect is to put him upon proof of his case. The facts charged, on which he founds his claim, are considered as denied, precisely as if the defendant had put in an answer denying them specifically. Such was the rule as laid down by Lord Hardwicke, in *Brownsword v. Edwards*, (2 Ves. Sen. 243,) and such is the rule in England at the present day. (Beames' Pleas in Equity, 267, &c.)

The defendant in this case, therefore, cannot put in an answer without oath, but he may state under oath, that an answer to the specific allegations of the complaint would, or might subject him to a criminal prosecution ; and such statement, when verified as required by the code, is to be deemed as putting in issue all the allegations of the complaint, in the same manner and with the like effect as if they had been each of them denied by the defendant. If there are any allegations in the complaint which the defendant may safely answer, he must do so in the ordinary way.

Order accordingly, but without costs to either party.

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**THE WASHINGTON BANK OF WESTERLY v. PALMER.**

A stockholder in an incorporated company, is not a party to the action, nor a person for whose immediate benefit it is prosecuted, within the meaning of section 399 of the code, and is therefore a competent witness in favor of the corporation.  
February, 1850.

THE facts are stated in the opinion of the court.

MASON, J., (after advising with Duer and Campbell, J. J.)—The plaintiffs have examined under a commission issued in this cause, their president, cashier and notary. On their cross-examination, they each of them stated that they were stockholders in the bank. A motion is now made for a new commission to re-examine the same witnesses, upon the idea that they were

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incompetent by reason of interest, and that the objection upon that ground has been removed.

The 398th section of the code declares that no person offered as a witness shall be excluded by reason of his interest in the event of the action. The next section (§ 399,) is as follows: "The last section shall not apply to *a party to the action*, nor to any person for whose *immediate benefit* it is prosecuted or defended, nor to any assignor of a thing in action assigned for the purpose of making him a witness," and it is supposed or feared by the counsel for the plaintiff that the witnesses may be excluded under some one or other of the clauses of this 399th section.

Stockholders in a corporation are not in form parties to a suit brought in the name of the corporation, that is, they are not parties to the record, and are not individually liable for costs, nor are they individually entitled to receive the amount which may be recovered, as plaintiffs are. It was indeed held at one time by the supreme court of the United States, that for the purpose of determining the question of jurisdiction in suits brought by a corporation, they would so far consider the individual stockholders parties, as to take notice of the places of their residence, and that they would not entertain a suit by the corporation, if it could not have been maintained by all the individual stockholders. But this doctrine was overturned in the late case of the *Louisville Rail Road Company v. Letson*, 2 Howard U. S. R. 497, 554, in which, the court, after a very elaborate argument, distinctly say the corporators as individuals are not parties to a suit brought by a corporation, but parties having an interest in the result.

The only question then is, whether the individual stockholders can be said to be persons for whose immediate benefit the suit is prosecuted or defended. It cannot surely be a correct interpretation of this phrase "immediate benefit," to apply it to every person who would be pecuniarily affected by the result of the suit, for that would annul the preceding section, which admits as witnesses persons thus interested. A creditor of the plaintiff, whose debt would be paid out of the recovery, or a party interested in a fund which would be increased by the

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Washington Bank v. Palmer.

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amount of the debt sued for, has an interest in the event of the suit, but the suit is not for the immediate benefit of such a person, because the money does not go directly into his hands as his property. On the other hand, a person to whom the debt in suit has been assigned, and who by virtue of the assignment would be entitled to receive it directly from the debtor, is one for whose immediate benefit the suit is prosecuted.

These sections of the code, are taken substantially from the British act of the 6th and 7th Victoria, commonly called Lord Denman's act, and the decisions under that act are in accordance with the views above expressed. Thus in *Hart, administrator, v. Stephens*, 6 Ad. & Ellis, N. S. 937, the plaintiff, administrator of a married woman, called the husband of the deceased, to prove admissions by the defendant of the debt within six years; and it was held by the court that the husband was competent, notwithstanding his possible benefit from his wife's estate. In the case of *Hill v. Ketching*, 3 Man. Grang. & Scott, 299, which was an action for broker's commissions, the plaintiff called one Cramond as a witness, who stated on his *voir dire*, that he had no claim against the defendant, but in consequence of his having introduced the plaintiff to the defendant, he should receive half the commission from the plaintiff, if he recovered, pursuant to an agreement with him to that effect, and the custom among brokers. It was therefore contended that the witness came precisely within the terms of the proviso in Lord Denman's act, being a person in whose immediate and individual behalf the action was brought. The case was very fully argued, and carefully considered. All the judges delivered their opinion on this and the other points involved. Chief Justice Tindal said, "if it had appeared that the plaintiff had made over to Cramond a moiety of the commission, then I should have said that Cramond was a person in whose immediate and individual behalf the action was in part brought, but that is not so. Cramond, though he claims a moiety of the commission under a separate and distinct agreement with the plaintiff, has no right to lay his hand upon any portion of the money to be recovered in this action."

This remark applies with great force to the witnesses in the

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present case. They may have a right to dividends to be declared, out of the profits, if there shall be any, and those dividends may be increased by the amount which the plaintiff may recover in this suit, but they have no right to lay their hands on any portion of the money to be recovered.

Maule, J., observed that Cramond was no party to the contract with the defendant, and therefore could have no right to sue, and was not necessarily, nor could he be properly a party to the record. That the meaning of the proviso in the act was, that no person who is the formal party to the record shall be called as a witness, nor any person who, though not the formal plaintiff, is yet substantially so. For instance, suppose a man assigns a bond, and sues the obligor on behalf of the assignee, the latter would be a person for whose immediate and individual behalf the action was brought, and therefore not an admissible witness.

These views appear to me to commend themselves as clear and sensible expositions of the act, and to apply with great force to the case before me; and I should have had no hesitation in saying that the witnesses examined under the commission in this cause were entirely competent, and that a second commission was useless, were it not that a directly contrary decision has been given at a general term of the supreme court held in Delaware county in June last, in the case of *The President of the Bank of Ithaca v. Bean and others*, (2 Code Reporter, 133.) The court there held that the stockholders compose the corporation, and that to say the suit is brought for the immediate benefit of the corporation, and not that of the stockholders, is making a distinction in a case where none is perceptible, and decided that the president of a bank, who is also a stockholder, is not a competent witness for the plaintiff. With all due respect for the learned judges who pronounced that decision, I cannot acquiesce in its correctness, or in the reasoning on which it was founded. But yet, upon this interlocutory motion, I do not think it proper to withhold from the plaintiff the opportunity of obviating objection, if he wishes to do so;

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Voss v. Fielden.

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and will therefore allow a second commission to issue upon terms.(a)

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VOSS v. FIELDEN.

Where sufficient time has elapsed, *prima facie*, to have obtained the return of a commission, issued with a stay of proceedings, the stay will be vacated on motion of the adverse party ; and on the cause being called for trial, the party taking the commission must establish the grounds for a further stay, if there be any, for the return of the commission.

February 9, 1850.

THE facts appear in the decision, which was made by the Chief Justice, after advising with two of his associates.

OAKLEY, CH. J.—In October 1848, the defendant obtained a commission, with a stay of proceedings, to examine witnesses at Buenos Ayres. The plaintiff now moves for leave to proceed to trial. By advices received in October last, there is reason to think that some progress has been made in the examination ; and affidavits are produced by the defendant, tending to show that there has been no unreasonable delay. The plaintiff claims that he ought to have an opportunity to meet the allegations in these affidavits, and that the defendant ought to move for a further stay.

On considering the matter, we think the rule ought to be, that the parties in a case like this have liberty to go to trial at the next term. If the commission be not then returned, it will be incumbent on the other party to apply for a further stay. This will give to the party desiring to go to trial, an opportunity to

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(a) The principle of this decision was affirmed by DUEB, MASON, and CAMPBELL, J. J., in *Davies, &c., assignees of Wilder v. Crabtree and others*, in the general term, December, 1850. It was there decided that the assignor in a voluntary general assignment for the benefit of creditors, was a competent witness in a suit brought by his assignees. And see *Bank of Charleston v. Emeric*, and *Erie R. R. Co. v. Cook*, *post*.



Cook v. Dickerson.

answer the statements on which his adversary relies for continuing the stay of proceedings and obtaining further time to procure the testimony.

Such will be the practice in future, where it appears that sufficient time, *prima facie*, has elapsed, for the execution and return of the commission.

COOK v. DICKERSON.

The code of procedure has not repealed or altered the provisions of the revised statutes, prescribing the security and the terms on which injunctions may issue to stay proceedings at law.

An injunction to stay an execution, at the suit of the defendant, granted without a deposit and bond, or an order of the court dispensing with the deposit, and allowing a bond in lieu of it and a bond executed accordingly, is irregular, and will be set aside.

The fraud in the recovery of the judgment, which will enable the court to dispense with a deposit and bond, is such a fraud as a false statement, a substitution of one paper for another, or the like. A failure to perform a promise or condition on which the judgment was given, is not such a fraud.

Feb. 9, 1850.

DICKERSON recovered a judgment against Cook by confession, and execution was issued and levied. Thereupon this complaint was filed to set aside the judgment and execution, on the ground of fraud, in this, that there was an agreement by D. that if C. would confess the judgment he, D., would cancel a certain mortgage held by him, and deliver up certain other securities to Cook. The complaint prayed for an injunction, application for which was made *ex parte* to one of the justices at chambers, and it was allowed by him, on the execution of a security by Cook in the form of an undertaking, as prescribed by the code. No bond was taken under the provisions of the revised statutes, nor any deposit made of the amount of the judgment. A motion to set aside the injunction was subsequently made and granted at the special term, from which order Cook appealed.

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Cook v. Dickerson.

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*S. Sanxay*, for the appellant.

*H. Brewster*, for the respondent.

**BY THE COURT.**—The first question is whether the injunction was regular under the circumstances, and we are of opinion that it was not regularly granted, and the order setting it aside must be affirmed. The only security taken was under section 222 of the code; and the undertaking there provided, applies only where there is no provision by statute for other security.

The revised statutes, (2 R. S. 189, 190, § 141 to 149,) require, that before the issuing of an injunction to stay proceedings in a personal action after judgment, a deposit shall be made of the amount of the judgment, and a bond with sureties executed for the payment of the damages and costs to the adverse party. Power was conferred on "the chancellor," to dispense with the deposit, and receive a sufficient bond for the amount of the judgment; and when the ground of the injunction is that the judgment was obtained by actual fraud, "the chancellor" had power to dispense with both deposit and bond.

It is contended, on the part of Cook, that these provisions are repealed by the code, and a new system substituted.

We think not. The code refers repeatedly to existing statutory provisions as to giving security on various proceedings. There is no inconsistency between the requirements of the revised statutes to which we have referred, and the undertaking to be given under the code in all cases of injunction. Both systems may work harmoniously together, and there is no reason for holding that the simple undertaking prescribed in the code, is a substitute for the well matured and important provisions of the former law on the subject.

As to the actual fraud alleged. It is true, that if the justice at chambers could not dispense with the security, and deposit on this ground, the court could do so when moved to dissolve or set aside the injunction. We have, therefore, looked into that matter. The statute does not mean the kind of fraud set up in this complaint, which is merely a breach of promise. It is com-

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King v. Merchants Exchange Co.

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plained that Dickerson has not performed what he agreed to do, if Cook would confess the judgment. The fraud meant, is such as substituting one paper for another, a false representation of facts, and the like. The statement made may be a good ground for the court to interfere to relieve Cook; but he must give the security according to the statute, and have relief on establishing a proper case for it.

Order affirmed, with leave to Cook to give security in ten days, according to the statute, in which event injunction to stand.

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J. G. KING v. MERCHANTS' EXCHANGE COMPANY and others.

A court of equity will not open a default, or relieve a party from the consequences of his own neglect, in order to enable him to set up an unconscientious or a dishonest defence.

So held, where after a decree by default for the foreclosure of a mortgage executed to secure bonds of a corporation, the consideration of which was money advanced to and used by the corporation for the purposes of its creation; the corporation sought to be let in to defend, on the ground that it had no power to execute such bonds and mortgage.

(Before DUER, MASON and CAMPBELL, J. J.)

February 16, 1850.

PETITION for a rehearing. The facts appear in the decision.

BY THE COURT. MASON, J.—The bill in this cause was filed in the late court of chancery to foreclose two mortgages, executed by the Merchants' Exchange Company to the plaintiff, as security for the payment of bonds of the company amounting in the whole to \$700,000, issued for monies borrowed by them and expended in the erection of the exchange. The company and also several other of the defendants, appeared and answered the bill, and the cause, having been duly transferred to this court, was regularly brought to a hearing at the last June term. The counsel for the company did not attend, when the cause came on to be heard, and the decree was taken against them by default, but the counsel afterwards appeared on the set-

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tlement of the decree, before one of the judges, and proposed various amendments to it, some of which were adopted by the judge.

A reference was ordered to Wm. Mitchell, Esq., to compute the amount due, and he was directed to give notice by advertisement to all the bondholders to come in and prove their respective demands. Other special directions were also given, both as to the mode of conducting the reference and as to the subjects on which he was to report. The solicitors and counsel of the company attended before the referee, under this order, and were heard in relation to the subject matter referred. The referee has made his report, and the cause is now on the calendar of the present term for hearing, on exceptions taken by some of the defendants. No exceptions were taken by the company to the report, nor was any complaint made, when the counsel appeared on the settlement of the decree, that the company had not been heard, nor has any application on the subject been made until the present time. A petition is now presented by the trustees of the company, praying that the cause may be reheard upon the merits, at the same time that the exceptions to the report are argued.

The grounds on which the rehearing is asked for are, in substance, that the petitioners are advised that the decree is erroneous in declaring the bonds and mortgages to be valid—that the mortgages are not either of them a valid or legal security for the benefit of the bondholders, and that the bonds are not valid obligations against the company. They also say that Mr. Bidwell, who acted as counsel for the company, was accidentally absent from the court when the cause was called, and that he intended to be present and protect the rights and interests of the company.

The petition farther says that the trustees lately chosen by the stockholders have, since their election, employed Augustus Schell, Esq., and that from his investigations it appears that a majority of the former trustees were holders of some of these bonds, and that it was for their interest to have the bonds declared valid, and therefore they took no measures to present to the court objections to their validity: that the stockholders, finding their interests neglected by those trustees, at an election held on the

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King v. Merchants' Exchange Company.

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14th of January last, elected other trustees in their stead. That they, the stockholders, ought not to suffer by reason of the accidental omission of their counsel or the neglect of their trustees to attend to their interests, and that they have a good and substantial defence on the merits, as they are advised by their counsel and believe.

The petition also sets forth, that the time for excepting to the report has expired, and that the rights and interest of the petitioners require that exceptions be filed, and they pray that they may have liberty to file them, and that the cause be reheard.

To this petition is annexed a certificate by three distinguished counsel of this court, that they have examined the case referred to in the petition, and are of opinion that the decretal order therein mentioned is erroneous in the particulars specified in the petition.

It appears from the affidavits and other papers read in answer to the petition that, some time in the month of June 1843, one Richard Barry, a judgment creditor of the company, filed a bill against them in the then court of chancery, to obtain payment of his debt, in which bill he insisted that the mortgages and bonds in question in the suit were void, and prayed that they might be so declared. To that bill the company put in an answer, insisting on the validity of the bonds and mortgages, averring that they had been executed and delivered in good faith and for valuable and adequate consideration, to parties who had lent and advanced to the company the several sums of money secured by them respectively; and they, the company, were justly indebted to the holders of the bonds in the sums stated in their condition, and that the moneys loaned to them on the security of the bonds and mortgages had been expended by them in the completion of the Merchants' Exchange building, which could not have been completed without the aid of such loans.

The suit of Barry was argued with great ability, on the part of the plaintiff, by two of the distinguished counsel who have given the certificate annexed to the petition in this case, and a profound and luminous opinion was delivered by Vice Chancellor Sandford, who, after a laborious investigation of all the objections urged against the validity of the bonds and mortgages,

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held them to be without foundation and the bonds to be entirely valid, and dismissed the bill with costs. That decision was not appealed from, and is to be deemed the law on the subject.(a)

On the argument of the petition, the counsel of the company, by direction of the court, submitted the points on which they intended to rely for the purpose of defeating a recovery on the bonds and mortgages, in case the court should grant them a rehearing. The court required to be informed on these points, in order that they might see whether any substantial rights of the stockholders had been sacrificed by the course the cause had taken.

There is not one of these points, however, which affects the equity of the plaintiff's claim. They do not allege any thing at variance with the facts stated in the answer of the company to Barry's bill, just referred to. They do not pretend that any fraud was practised on the stockholders, but merely state technical objections to the form of the securities and to the power of the company to raise money upon them, most of which objections had been taken and overruled in the case of Barry.

There is an important difference, however, between that case and the present. In the case of Barry, a judgment creditor of the company attacked the securities, in order that by destroying them, he might himself obtain the payment of his just demand which was otherwise hopeless. In the present case, the parties themselves, who created the securities, who applied for and obtained the money on the faith of them, who expended it upon the building they have erected, and who have been in the enjoyment of its benefits in common with the whole community, are seeking upon mere technicality, to deprive their creditors of the benefit of these very securities on which alone the money was advanced.

Had the questions now sought to be raised been properly presented to the court when the cause was regularly called on for hearing, the court would have given to them a patient and thorough investigation; and if we had been satisfied that the objection to the bonds and mortgages, however technical and

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(a) *Barry v. Merchants' Exchange Company and J. G. King*, 1 Sand. Ch. R. 280.

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unconscientious, were yet legally valid, we should not have hesitated to declare the bonds to be void, and to free the property from the lien of the mortgages, although we might as individuals have been pained at being used as instruments in inflicting an indelible stain upon the mercantile character of the city.

We are, however, spared the disagreeable necessity of considering the question. The time for making objections of this kind in this cause has gone by.

The plaintiff has obtained his decree regularly, according to the course and practice of the court. The defendants suffered a default, and they have moreover slept upon it for nearly eight months. They come before the court asking as a favor, that which they acknowledge they cannot claim as a right. But it is a well established rule that the court will never open a default, or relieve a party from the consequences of his own neglect, in order to enable him to set up an unconscientious or a dishonest defence. The books are full of decisions to this effect. (*Gay v. Gay*, 10 Paige, 374; *Bard v. Fort*, 3 Barb. Ch. Rep. 633; *Beach v. The Fulton Bank*, 3 Wen. 561.)

According then to the established practice of the court this application ought to be denied. The object is to enable the defendants to set up a defence contrary to the right and justice of the case, and the granting it would facilitate the prosecution of a scheme, which, if successful, would, upon merely technical grounds, defraud the creditors of the payment of their just demands.

It is said, however, by way of excuse for not having made this application sooner, and indeed as a reason why the defence was not interposed at the hearing, that the former trustees were themselves bond-holders, and therefore personally interested in having the bonds declared valid; that they sacrificed the interest of the stockholders to their private interests, and that in truth the stockholders have not had an opportunity to make their defence until the present time. Admitting this to be so, it does not render the defence less dishonest, or a whit more entitled to the favor of the court.

But the opposing affidavits show that regular elections of



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trustees have been held every year since 1836 ; that the plaintiff was put in possession of the mortgaged premises as mortgagee in the month of October, 1843, and has ever since that time retained possession in that character ; that the case of Barry, in which the trustees upheld the validity of the securities, was decided in 1844, and that this suit was commenced in March, 1848, so that if the stockholders disapproved of the conduct of the trustees, and really wished or intended to contest the validity of the bonds, they had had ample opportunities before the last election, of putting in trustees who would have taken the ground now sought to be taken in this case. If, therefore, they have lost the opportunity of making these technical objections, it has been entirely owing to their own negligence, and they are not entitled on this ground to favor from the court.

But we apprehend that the former trustees were actuated in this matter by higher motives than those which have been attributed to them, motives which unfortunately those who at present control the company's affairs, do not seem to appreciate.

They knew that the debts were justly due—that the money secured by the bonds and mortgages had been lent upon the application and solicitation of the company themselves ; that the particular form of the securities had been offered and devised by themselves ; that but for the monies obtained upon their credit, the noble structure which is the pride and ornament of our city, would never have been erected ; and that for them to attempt upon such grounds as were contended for by Barry, and are attempted to be set up here, to repudiate these debts, would shock the moral sense of every honest man.

We think that in the course they pursued, they manifested no more than a proper regard for their own character, and that of their constituents. And it is with feelings of no ordinary satisfaction that we find ourselves, not merely authorized but absolutely required by the established rules of the court to refuse to these petitioners the opportunity of presenting questions, the discussion of which in our judgment injuriously affects the character of the company, and through them of the whole mercantile community.

The petition for rehearing and also for leave to file exceptions



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McFarlan v. Clark.

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o the referee's report is denied ; the plaintiff's costs of resisting the petition to be taxed and allowed as costs in the cause.

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**McFARLAN, DENISON and BRIDGE, v. CLARK and BARTON.**

**BRIDGE v. CLARK.**

**COTHEAL v. CLARK.**

Where three suits were brought against a defendant, in the first of which, prosecuted in the name (with others) of the plaintiff in the second, and for the benefit of the plaintiff in the third suit, the point involved was one which would determine the right of the two plaintiffs on which they founded their claim in the second and third suits, (though it would not determine their damages ;) the court ordered the two last suits to be stayed until the decision of the first, on the defendant therein, stipulating in case he failed in the first, to contest in the two last only the question of damages.

March 4, 1850.

THE facts appear in the opinion of the court.

MASON, J.—This is a motion on the part of the defendant for a rule staying all proceedings in the last two causes above mentioned, until the determination of the first above entitled cause, or for such other order as may be proper in the premises.

The first entitled suit is brought to compel a specific performance of certain articles of association, entered into by the plaintiffs and others, and the defendants, whereby the defendant, Clark, agreed to convey to the plaintiffs, as trustees of the association to be called the Guyandot Land Company, certain lands particularly set forth in the articles ; or in case the agreement cannot be specifically performed, then that the plaintiffs may recover [damages against the defendants, or one of them, for the non-performance of the agreement. The plaintiffs sue in behalf of themselves and the subscribers to the agreement, of whom Cotheal, the plaintiff in the third suit, was one.

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The defence, as set up in the answer, is that the company never was organized, and that the articles are of no binding force.

The second suit is brought by one of the plaintiffs in the first suit, and also a subscriber to the articles, to recover damages for the breach of a written agreement by the defendant Clark, to transfer and assign to him, after organization of the company, two hundred and fifty shares of the stock thereof; and the defence is, that the company never was organized, and of course the agreement to transfer is not binding.

The complaint in the third suit is identical with that in the second, except as to the number of shares, which is only one hundred and twenty-five instead of two hundred and fifty, and the defence is also precisely the same.

It is clear that in all three suits, the great question is, whether the company was organized, so as to render it obligatory on the defendant Clark to convey the land. If it was not, he cannot be called upon to do so, or be made answerable for not transferring shares which, until after such organization, had no existence. The execution of the articles in the first cause, and of the contract in the second and third cases, by the defendants, is expressly admitted, so that no proof will be necessary or proper in either of the cases, but such as bears upon the question of organization. But I see no reason for compelling the defendant Clark to litigate this question in three different suits, or to allow the plaintiffs to proceed *pari passu*, subjecting him to the heavy costs which each of them must occasion.

If the court shall be of opinion in the first suit, that Clark ought not to perform the agreement, it will follow, of course, that there is no company, and no shares to be transferred, for they are based upon the conveyance of the land, and that question ought to be, and in point of law would be, conclusive with the plaintiffs in the other two suits; for the plaintiffs in them are respectively plaintiffs in the first—Bridge, by name and in form, and Cotheal in reality, the suit being in behalf of all the subscribers, and one in which they have a common interest. (*Bouchaud v. Dias*, 3 Denio, 238.)

So on the other hand, if the court should come to the conclusion, in the first suit, that the contract ought to have been per

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formed by Clark, but that they cannot make a decree for its specific execution as against Clark, because he has disabled himself, or because Barton cannot, by reason of circumstances in his favor, be compelled to convey to Clark, then the plaintiffs will be entitled to damages, and Cotheal as well as Bridges, will be authorized to come in and prove their amount. The rule of damages, I apprehend, would be the loss which each individual subscriber had sustained by reason of the failure of the defendant to fulfil his agreement, and the measure of that loss would be the difference between the value of the shares each were entitled to receive, and the sum agreed to be paid for them, and that would be the precise rule and measure of damages in the second and third suits.

It is only on the supposition that the defendant Clark should be decreed specifically to perform his contract, that all the questions in the second and third suits would not be settled and terminated in the first suit. In the event last supposed, the company would be declared to have been organized so as to oblige the defendant to convey the lands, and of course would have been in default in not having conveyed. The plaintiffs in the second and third suits, would then be entitled to recover damages by reason of the breach of his agreement to transfer the shares. But in the ascertaining of these damages, it would not be necessary, nor ought the defendant to be permitted to litigate again the question of organization. The decision on that point in the first suit, would be conclusive upon him.

Under a view of all the circumstances of the case, the proceedings in the second and third suits should be stayed until the determination of the first suit, provided the defendant will stipulate in the two former, that in case there should be a judgment for specific performance against the defendants, or against Clark in the first entitled suit, the plaintiffs in the other suits may have a judgment for such damages as they shall prove to have sustained; and in such case, they have liberty to apply on due notice to the opposite party, after a decree for specific performance in the first entitled suit, for a rule for such assessment, either before the court or a referee, or in such other way as the court may think proper, and the defendant may take an order to that effect.

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Smith v. Greenin.

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**SMITH, TORREY & Co. v. GREENIN and VINE.**

The plaintiff can demur to an answer, only for defects in respect of the new matter set up therein by way of avoidance.

Irrelevant or redundant matter in an answer, may be stricken out on motion, and in like manner uncertain or indefinite matter may be made more definite.

Immaterial matter cannot be demurred to.

The defendant's omission to answer an allegation of the complaint, is no ground of demurrer.

March, 1850.

THE points presented appear in the decision:

MASON, J.—The code has enacted some new rules with regard to insufficient and irrelevant pleadings, which have not been attended to in these demurrers.

In the first place, a plaintiff can demur for insufficiency, only to new matter which is set up by way of defence. (Section 153 in connection with section 149.) If irrelevant or redundant matter is inserted, he may move to strike it out; or if an allegation is so indefinite or uncertain, that the precise nature of the defence is not apparent, he may move that it be made more definite. (§ 160.)

The first demurrer taken, falls under the provisions of this last section. If the statement of the agreement between the defendants is immaterial, it may upon application be stricken out; and if the allegation of the defective execution by the plaintiffs of the articles, is too indefinite or uncertain, it may be made more definite or certain by amendment; or it may be stricken out as irrelevant. This last matter, if well pleaded, would be in the nature of a demurrer to the plaintiff's claim. It amounts to this, that upon the plaintiff's own showing, the defendants were not bound by the agreement, and no demurrer can be taken to a demurrer, whether the issue in law be well or ill tendered. (Steph. on Plead. 256.) The first demurrer must therefore be overruled.

The fifth demurrer is liable to one of the same objections; it

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Huff v. Bennett.

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is taken on the ground of the immateriality of the matter demurred to, and must therefore be overruled.

Nor is it a ground of demurrer, that the defendant has not denied any allegation of the complaint in the form and manner prescribed by section 149. The 168th section provides, that every material allegation of the complaint not specifically controverted by the answer, as prescribed by section 149, shall be taken as true. If, therefore, the plaintiff is right in supposing that the defendants' denial of knowledge of any fact other than from the complaint, is not such a denial as is required by the code, he is saved from the necessity of proving such fact on the trial. This remark applies to the third, fourth and sixth demurrers, which must therefore be overruled.

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HUFF v. BENNETT.

Where any exception is taken at the trial, the party may make a case, presenting such exception.

An order enlarging the time to make a case or bill of exceptions, is not a stay of proceedings.

An *ex parte* order of a justice at chambers, staying proceedings for more than twenty days, is null, and may be disregarded.

March 16th, 1850.

THIS case was tried by a jury before the chief justice, and a verdict rendered for the plaintiff on the 22d of December, 1849. On the 24th of December, the defendant's attorney obtained from a justice at chambers, on an application without notice, an order giving the defendant thirty days to make a case or bill of exceptions, and "that in the mean time, and until the case be settled, all proceedings be stayed." On the 12th of January the defendant served a draft case, and amendments thereto were served by the plaintiff, and notice given by the defendant to attend before the chief justice to settle same. When the parties attended before him, it was objected by the plaintiff that he ought not to settle the case as it had not been served in time, and the defendant was directed to move for an order to settle, when

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the question of the regularity of the proceedings might be discussed. The defendant moved accordingly.

*B. Galbraith*, for the defendant.

*A. Nash*, for the plaintiff.

OAKLEY, CH. J.—This was an action for libel, tried before me; there was a verdict for the plaintiff for a small sum; and on the coming in of the verdict, I gave the usual directions to the clerk, and the usual entry of judgment was made. There was no order that the cause be reserved for argument or further consideration.

The attorney for the defendant obtained from a justice of the court of chambers, without notice, an order extending the time to make a case thirty days, and staying plaintiff's proceedings in the mean time. The plaintiff, notwithstanding this order, entered up and perfected his judgment. The defendant made and served a case, and the plaintiff served amendments thereto. When the parties attended before me to settle the case, some circumstances that then transpired induced me to direct notice of a motion for leave to settle the case, so that the question might be regularly argued. The motion was made, and it involves in the first place, the question whether any right was reserved to the defendant at the trial to make a case. The right was not reserved in terms, and I am not prepared to say any was reserved, but it is our practice where, in the course of a trial any exception is made, to regard that exception as an implied declaration of an intention to make a case. Wherever such an exception is taken in any case tried before me, I always consider the right to make a case reserved. Such exception was taken here, and the defendant, therefore, had a right to make a case.

Then has this case been made in pursuance of the rules of practice. The supreme court rules which apply also to this court, require the case to be made within ten days of the trial. Here the case was not made within ten days, but within the enlarged time granted by the order of the judge. The question

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Comstock v. Bayard.

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is raised, whether the justice had a right to make that order. There was no foundation for questioning the right of the judge to make an order in the cause, although he could not stay the plaintiff's proceedings for more than twenty days. He had power to enlarge the time to make a case, and the order to stay the plaintiff's proceedings for thirty days was undoubtedly improvidently granted, and we so consider it. (Code, § 401.) An order enlarging the time to make a case, does not operate as a stay of proceedings, and the defendant therefore had a right to enter and perfect his judgment.

The order extending the time was regular, the defendant's attorney has acted in accordance with the practice, and we think, therefore, the defendant has a right to have his case settled, and so decide.

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COMSTOCK v. BAYARD and others.

Where in a suit against three, for the recovery of money, two suffer judgment by default, and the third defends the suit and has a verdict in his favor, he is entitled to costs against the plaintiff under section 305 of the code.

April 25, 1850.

THIS was a suit against Bayard, Brinkerhoff and Weeks, to recover the proceeds of goods alleged to have been left with them as partners, for sale. Bayard denied his liability. The other two defendants suffered judgment to go by default. On the trial, there was a verdict for Bayard, who now claims costs.

BY THE COURT.—The 304th section of the code allows costs of course to the plaintiff, in an action like this, where he shall recover fifty dollars or more. Section 305 gives costs to the defendant in the same actions, unless the plaintiff be entitled to costs therein. Section 306 permits the court to grant costs to defendants not united in interest or in their defences, who succeed, when the plaintiff recovers against others. This section

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Grinnell v. Schmidt.

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applies to other actions, than those specified in the two previous sections.

If the costs rested in our discretion, we would grant them to Bayard; but he is clearly entitled to them by the code. This follows from the nature of the action and the fact that the plaintiff is not entitled to costs against him. Section 305 gives the defendant costs in such case, and it applies to any defendant prevailing in the suit against the plaintiff.

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**GRINNELL, MINTURN & Co. v. SCHMIDT & BALCHEN.**

Section one hundred and eleven of the amended code, which requires that every action shall be prosecuted in the name of the real party in interest, is an enactment of the rule respecting parties which has always prevailed in courts of equity; and it should be applied, as far as practicable, according to the principles adopted in those courts.

A factor or other mercantile agent, who contracts in his own name, on behalf of his principal, is a trustee of an express trust, within the meaning of section one hundred and thirteen of the code, and is the proper party to bring an action upon the contract.

After judgment, a defendant will not be permitted to open the cause so as to set up that the suit has not been brought in the name of the real party in interest, provided the plaintiff have the right to receive the money recovered, and can give a valid discharge.

April, 1850.

THE plaintiffs purchased and shipped in their own names, a cargo of corn on board the brig Selma for Sligo, under an agreement with the defendants, who had chartered the vessel; and took a bill of lading from the master in the ordinary way. The vessel put in at St. Thomas in distress, and the corn being damaged, was sold and the proceeds received by the defendants. This suit was brought to recover these proceeds. It was tried in March last, when a verdict was given in favor of the plaintiffs, and judgment was subsequently rendered on the verdict.

On the twenty-third of April, the defendants presented to one of the justices at chambers, affidavits that one of the plaintiffs



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had admitted to one of the defendants, in conversation on the ninth of April, after the verdict and judgment had been rendered, that the plaintiffs had no interest in the cargo, but that the same was purchased by them solely as agents of Baring & Brothers, of London; and that neither of the defendants had any reason to believe, until after verdict and judgment, that the plaintiffs had acted as agents in the matter. They thereupon obtained an order to show cause, why the verdict and all subsequent proceedings, should not be set aside and the defendants allowed to amend their answer in conformity with the facts alleged in the affidavits.

*N. D. Ellingwood*, for the defendants.

*D. Lord*, for the plaintiffs.

**BY THE COURT. MASON, J.**—This motion is founded upon the one hundred and eleventh section of the amended code, which declares that “every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113,” and the question presented is, whether the defendants are entitled, after verdict and judgment, to have the whole case opened, for the purpose of introducing, by way of defence, the fact not previously discovered, that the plaintiffs made the contract on which the suit is brought, as agents or factors of the Messrs. Barings.

This is nothing more than a statutory enactment of the rule respecting parties which has always prevailed in courts of equity. Adopted by those courts on grounds of public policy and convenience, they will never suffer it to be so applied as to defeat the ends of justice, and therefore it has received numerous qualifications and exceptions. Some of these have been incorporated in the subsequent sections of the code. Although from its being placed on the statute book, it cannot be so easily moulded as before to suit particular cases, yet we are bound in its application to adopt, as far as practicable, those principles which the courts have found to be best suited to advance the ends of justice. Ordinarily the objection of want of necessary parties, is taken ad-

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vantage of in courts of equity by plea or demurrer, or upon the hearing. If the absence of necessary parties should not be discovered until after decree enrolled, the only way of presenting the fact to the court, was by bill of review ; but it rested solely in the discretion of the court to allow such bill to be filed ; and permission would therefore be refused, although the facts it admitted, would change the decree, where the court, looking to all the circumstances, should deem it unadvisable. (Story's Eq. Pl. 417.)

Notwithstanding the statute, we think the court is now at liberty to look into the circumstances of the case, and exercise its discretion in granting or refusing a motion which is analogous to a motion for leave to file a bill of review. If it were made to appear that the plaintiffs had no right to the receipt of the monies recovered by the judgment, and no title whatever to be parties to the suit, and that fact should not be discovered till after judgment, I should conceive it to be the duty of the court to interfere by opening the judgment, and to allow this fact to be put in issue. But that is not this case. In the first place, the plaintiffs are proper, if not necessary parties to this suit. The contract was made by them in their own names, the corn was purchased and shipped by them, and they were personally liable for the freight. Had a suit in chancery been brought on this contract, a careful pleader would have joined them with the Barings, or the true owners, as plaintiffs, and would hardly have considered the suit complete without them. (Calvert on Parties, 218, 229.) But there is nothing in the code to *prohibit* them from being parties to the suit, although they be agents. All that the code requires is that the real parties in interest should be before the court. The statute was intended, as we have intimated, not to establish an entirely new rule, but to apply the old chancery rule to all cases. (See remarks of the commissioners to Title III of the Code of 1848, p. 124.)

In the next place, admitting the plaintiffs to be the mere factors of the Barings, yet they have, by the terms of the contract, the right to receive the monies payable under it. The defendants would not only be safe in paying them, but bound to do so until actual notice from the principals not to pay. The know-

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ledge of the fact that the plaintiffs are agents of the Barings, does not in any manner affect the obligations of the defendants to pay them.

Suppose then this application were granted, and the answer of the defendants amended, the present plaintiffs would still be *proper* parties, and the only effect of the amendment would be to compel the Barings to be brought in as plaintiffs. But the right of the present plaintiffs to receive the moneys recovered, and to discharge the claim, would still remain the same. It is manifest, then, that by the judgment as it now stands, no substantial rights have been violated, and that no protection would be secured to the defendants. The whole question resolves itself into a matter of mere form ; and the granting the motion would be to allow form to over-ride and control the justice of the case.

I am of opinion, therefore, that at this stage of the suit, it is not imperative on the court to allow this application, but that it is a matter resting in discretion, and that in the exercise of a sound discretion it ought not to be granted. The only effect of granting it would be to delay the rightful owners of the money from its speedy collection, and to afford to the defendants a new trial, when they cannot attain it in any other way.

The preceding observations have been based on the idea that the Barings ought by force of the 111th section to have been made parties to the suit. That section, however, excepts from its operation the cases enumerated in section 143, which reads as follows : " An executor or administrator, a *trustee of an express trust*, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted."

It has been generally supposed that the words "express trust" in this section, refer to trusts of land authorized by the revised statutes, and which are in the statutes themselves termed "express trusts," and to them alone. It is not necessary, however, to give to the words this restricted meaning. They are capable of a more extensive signification, so as to include all contracts in which one person acts in trust for or in behalf of another. Of this kind are contracts made by factors, and other mercantile

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agents, who act in their own names, but for the benefit of and without disclosing their principals. So complicated and so extensively ramified are mercantile transactions, that it is frequently impossible to tell who are the real parties in interest. The parties who execute an order, or make a contract in pursuance of instructions from their correspondent, may be themselves entirely ignorant of the names or residence of the real principals. In the case before us, Messrs. Baring Brothers, although they gave the order to the plaintiffs in their own names, may themselves have been the agents of some house in Sligo, from whom they received their instructions, and that house may have acted under the directions of several dealers there who may have united in the purchase of the cargo. Now, if the verdict and judgment of the court on the merits is to be set aside, and the whole controversy opened, whenever the discovery shall be made that some person has an interest in the recovery who was not a party to the suit, it will be extremely difficult hereafter to hold a judgment upon a mercantile contract. If the defence now proposed were to be allowed, and the Barings made parties to the suit, it might turn out after a second trial, verdict and judgment, that the house in Sligo was interested, and by the same rule the judgment must be opened again.

It is, therefore, the duty of the court to apply the words "trustees of an express trust," to cases like the present, if it can be done without violence to language; and we think it can. Mercantile agents and factors who, according to the usage and custom of merchants, do business in their own names, but for other parties, are trustees in the strict sense of the term. They are so in fact, and they have always been held liable as such, to account in a court of equity. The trust, though not created by a formal deed or instrument, yet appears upon the face of every order contained in the correspondence of their principals, in pursuance of which they act, and may therefore well enough be called an "express trust."

We know, too, that in the code words are not always used in the strict technical sense, but in such a sense as would be apparent to persons unskilled in legal phraseology. There is, moreover, high authority for the construction we have given to the

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Townsend v. Townsend.

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words in question. In the code submitted to the legislature at their last session, but not acted upon, sections 597 and 598 correspond to sections 111 and 113 of the present amended code, and are proposed to be re-enacted in the same terms, but with this addition to section 599, "a person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section." The commissioners add a note as follows: "Amended Code, § 113. The last sentence is added to remove a doubt which has been expressed."

The construction put on this section is, then, the construction of the commissioners, who seem to have anticipated the very question raised in this case. If I am correct in this view, the plaintiffs were the proper and the only proper persons to bring this action, and the defence of want of parties, even if allowed to be interposed, would be unavailing. On this latter point I have consulted with two of my associates, Judges Duer and Campbell, and am authorized by them to say that they concur in this interpretation of the words "trustee of an express trust," in the 113th section.

In any view of the case, therefore, this motion ought not to be granted, and it is denied with costs.

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TOWNSEND v. TOWNSEND.

An agreement made during coverture, between a husband, his wife, and a trustee of the latter, that in consideration of her enjoying separately and absolutely controlling her separate property, she would relinquish her dower in his lands, is invalid, and cannot be enforced against her in an action for her dower.

In a complaint under the code, asking to have dower set off and admeasured, it was held that it might be regarded as a substitute for the former petition for admeasurement, or the former bill in equity; and thus it was no objection that the defendant, who was seized, was not in the actual possession of the lands, or that six months had not elapsed since the death of the husband.

April, 1850.

DEMURRER to an answer. The complaint stated the mar-

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riage of the plaintiff to Benjamin Townsend in 1839, his death in August, 1848, and that during her coverture he was seized of various lands in the city of New York, particularly described. That her husband devised the lands to the defendant, some for life and some in fee, who is in possession of the lands described, either personally or by his tenants, and in the receipt of the rents and profits; and that the plaintiff is entitled to dower therein. The complaint prayed judgment for one equal undivided third of the premises as and for her dower, and that it might be admeasured and set off to her by commissioners.

The defendant, by his guardian *ad litem*, answered, among other things, that a large part of the premises lie vacant and unoccupied, and are wholly unproductive; a portion of them were let to and possessed by tenants at B. Townsend's death, and the rents were collected for the defendant's use and benefit, but he is not personally in the actual occupation or possession of any part of the premises. The answer then set up an indenture executed between B. Townsend, the plaintiff, and a trustee on her part, in 1845, for the expressed purpose of assuring to each of the former, their separate lands, free from any claim of the other for dower or curtesy, by which the plaintiff was to be at liberty to receive the rents of her own lands during her life, to sell or mortgage the same, and to devise the same, and in all these acts B. Townsend agreed to execute all necessary instruments. The trustee, with her assent, agreed she should never claim dower in B. T.'s lands, but would, whenever required, release the same. The indenture was duly acknowledged. The answer stated that the plaintiff, after its execution, enjoyed all the fruits of her separate property, as if she were sole; and it submitted that she was not entitled to dower in any of the lands claimed by her.

To this answer the plaintiff demurred, and stated the following causes of demurrer, viz:

1. That the indenture in the answer alleged did not release the plaintiff's right of dower in and to the premises mentioned and described in the complaint.

2. That it appears that the plaintiff and Benjamin Townsend, before its execution, had been lawfully married, and were at the

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time of such execution cohabiting together as husband and wife, and therefore such indenture was, as to the plaintiff, void, and the alleged covenant or agreement therein contained was of no binding force or effect upon her.

3. That it does not appear that there was any sufficient valid or legal consideration for the indenture.

4. That the answer does not set forth facts sufficient to form a defence.

*M. S. Bidwell*, for the plaintiff.

*J. A. Lott*, for the defendant.

PAINE, J.—The only question upon the merits of this case is, whether a contract entered into between husband and wife during coverture, by which it was agreed that in consideration of being permitted to control and enjoy the property which she had at the marriage, she should relinquish her claim to dower, can be enforced against her by depriving her of dower.

I know of no such doctrine, nor any case in support of it. Contracts made by the wife with her husband, may, under some circumstances, by compelling an election, be incidentally enforced against her. It was, upon this ground, very evidently, that the chancellor proceeded in disposing of the case of *Livingston v. Livingston*, 2 Johns. Ch. Rep. 539. There the wife, who was dead, was represented by her infant children, for whom the court asserted its right to make, and did make the election. There, the property on each side having survived the marriage, there was a subject for election. But here probably the husband's legal right to all the wife's property ceased at his death. At any rate, the answer does not set up that the widow is enjoying, or has enjoyed, since his death, any of the property to which he or his heirs are entitled. The doctrine of election, therefore, cannot be applied to the case.

What the chancellor says about the contract between the husband and wife, in *Livingston v. Livingston*, refers only to the possibility of such a contract, and whether, if bona fide, it may not be carried into effect under some circumstances. The au-



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thorities which he cites, go no further than this ; and I imagine that neither he nor they thought of asserting that such a contract can be enforced against the wife at law, or in any way, except where some kind of equitable relief can be found.

The defendant, on the argument, insisted on two technical grounds of defence, both of them based upon the supposition that this is an action of ejectment. These grounds are, first, that six months had not elapsed after the death of the husband, before the suit was brought, (2 R. S. 303, § 2, subd. 2;) and, secondly, that the defendant is not the actual occupant, nor exercising acts of ownership upon any parts of the premises, nor claiming title thereto.

It would be a sufficient answer to both these objections, to say that they are not set up as grounds of defence by the answer. With respect to the first, there is not the slightest indication in the answer, that such a defence was thought of; on the contrary, the language of the answer, echoing the complaint, states the time of the husband's death so vaguely that it is impossible to decide upon this demurrer, that six months may not have expired. Nor does it any where appear upon the pleadings, when the suit was commenced. This is hardly a compliance with the existing law as to a statement of the defence.

As to the second objection, the answer merely says that a portion of the premises are occupied by tenants who pay the defendant rent; that the greater portion is unoccupied; and that the defendant is not personally in the occupation of any part of the premises. But the answer does not say that as regards any part of the premises, the defendant is not a proper party; that any other person should have been made a party; or that either of these grounds will be insisted upon as a defence. This, also, it seems to me, is not precisely according to the existing law.

But supposing these defences to be well set up, have they any validity?

The code abolishes the forms of existing actions, and the distinction between suits at law and in equity, and provides that there shall hereafter be but one form of action, (§ 69;) and that all rights of action given or secured by existing laws, may be prosecuted in this single form of action. (§ 468.)



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Shore v. Shore.

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Now, before the code, there was, besides the action of ejectment for dower, a petition for admeasuring the same; and they both sought and obtained the same relief, viz., admeasurement of dower by commissioners. That is precisely the relief which the complaint in this case prays for, and therefore it may quite as well be in the place of the petition as the ejectment; and if so, it is free from both these objections.

But it is said the petition is preserved by the code, (§ 471,) and as this is not a petition, it must be the ejectment. It is true the petition is preserved, but a party may either adopt that, or the summons and complaint. (§ 468.) The two sections construed together, merely secure him an election between the two modes of proceeding. This is construing them so that they both stand.

But suppose further, that the form of the petition must be adhered to, and that this, therefore, is not a substitute for that, still there is nothing to prevent its being a substitute for a bill in equity, which undoubtedly lay for the admeasurement of dower, (*Badgley v. Bruce*, 4 Paige, 98,) and which is also free from these technical difficulties.

The plaintiff must have judgment upon the demurrer.

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SHORE v. SHORE.

Under the code, a married woman may sue for a limited divorce, without the intervention of a next friend.

April, 1850.

THE material facts appear in the judgment pronounced.

CAMPBELL, J.—The complaint was in the name of the wife, against the husband, asking for a limited divorce. An order was made allowing alimony. A motion is now made to vacate that order, and to dismiss the complaint, on the ground that the wife cannot sue without a next friend. Section 114 of the code

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provides that when a married woman is a party, her husband must be joined with her, except, 1. that she may sue alone when the action concerns her separate property ; and 2. she may sue or be sued alone, when the action is between herself and her husband.

It would seem as if the mere reading of the last subdivision of this section was all that was requisite. She may sue or be sued alone. If the word "alone" has any meaning, it cannot refer to her husband. We cannot construe it, when the action is between herself and her husband, that she may sue or be sued without her husband. The law only means that she may sue or be sued without the intervention of any other party. Under the former law, the wife might sue in her own name alone, where she sued for an absolute divorce. It was held, however, that where she sued for a separation from bed and board, she could do so only by her next friend. The language of the statute was however different in respect to the two proceedings.

It is unnecessary here to refer to the provisions of the revised statutes on the subject, but it may be remarked that in the leading case of *Wood v. Wood*, 8 Wen. 357, it was held, by Chief Justice Savage and a very considerable minority of the court for the correction of errors, that even under those provisions, the wife could sue for a separation without a next friend. If under the code, a wife cannot sue for a separation without a next friend, neither can she, it would seem, sue alone for an absolute divorce. Her right to sue for one or the other, is now given together in the same section, and without any distinction. She may sue or be sued alone when the action is between herself and her husband. She may sue him, or he may sue her, for a divorce absolute, without any intervening party. No one doubts this, and yet the same language is applied to all cases between husband and wife. I cannot see how the distinction can be taken, and I must hold that where the action is for a limited divorce, the wife may sue in her own name alone. The motion must be denied without costs. My associates, Judges Duer and Mason, to whom this opinion has been submitted, concur with me.

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Carpenter v. Spooner.

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CARPENTER v. SPOONER.

This court will not sanction any attempt by fraud or misrepresentation, to bring a party within its jurisdiction.

Where a party having been induced by a false statement, to come within the jurisdiction of the court, for the purpose, was then served with a summons and complaint in an action in this court, the service was, on motion, set aside.

May 25, 1850.

APPEAL from an order made at chambers, setting aside the service of a summons, with costs. The facts appear in the decision.

*A. Crist*, for the plaintiff.

*Spooner*, for the defendant.

BY THE COURT.—This was an action for libel. Both parties reside in Brooklyn, and out of the jurisdiction of this court. The plaintiff, however, was desirous of having the cause tried in this court. In order to bring the cause within its jurisdiction, it was necessary that the summons should be served within this city. A clerk of the plaintiff's attorney, therefore, procured a person to write to the defendant, requesting him to call on the writer next day, in this city. The defendant came, in order to comply with the request in the letter, and when he was leaving the ferry boat, was met by the person who had written the letter, and was then served with the summons in this action. The whole proceeding was a trick, for the purpose of giving this court jurisdiction.

The excuse alleged by the plaintiff is, that he had been so libelled by the defendant and others in Brooklyn, as to raise the public feeling there against him, and he could not hope for a fair trial in the County of Kings. If so, there is a sufficient remedy by moving the supreme court; and we have no doubt, it will, on application, be properly applied. An application was made to set aside the service of this summons, and we

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think it was well founded. This court will not sanction any attempt to bring a party within its jurisdiction by fraud and misrepresentation. And where by a false statement or fraudulent pretence, a party is brought within the jurisdiction, and there served with process, the service will be set aside. We recollect a case where a party was entrapped into this state out of another state, and then served with process, and there the service was set aside.

If a party who is not within the jurisdiction voluntarily come within it, he thereby becomes amenable to the process of the court, but not unless he comes voluntarily. The court will not countenance any proceeding of the nature adopted in this case.

Appeal dismissed with costs.

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**BANK OF CHARLESTON v. EMERIC AND DAVENNE.**

Where at the trial, documentary evidence which proves itself, and on which no question can arise in the cause, except such as is apparent on its face, is unadvisedly omitted, and an objection taken thereupon; the court will nevertheless permit the document to be produced upon the argument of the case; and if there be no surprise apparent, or any point in which the defence was prejudiced by the omission at the trial, the court will regard it as having been produced at the trial.

A co-defendant, who is primarily liable for the debt claimed, is, under the code, a competent witness for the plaintiff.

(Before OAKLEY, CH. J., and SANDFORD, J.)

May 25, 1850.

THE suit was brought to recover money advanced by the plaintiffs to Edward Davenne, in Charleston, for the purchase of cotton, on the joint account of himself and Emeric. Davenne drew a bill on E. for the advance, which E. did not accept. The bank, having retained the bill of lading of the cotton, sold the cotton, on failing to obtain satisfactory security from E., and brought this suit to recover the balance. The defence was, that Davenne's purchase was not on joint account, it not being conformable to the authority from Emeric. Upon the trial, the tes-

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timony of Davenne, taken on a commission, was offered in evidence by the plaintiffs and received; Emeric objecting that he was not a competent witness.

The plaintiffs having closed their proof, the defendant Emeric moved for a non-suit, on the ground that they had not given proof that they were a corporation. The judge overruled the motion, and the plaintiffs had a verdict. The defendant moved for a new trial on a case. Several points were presented, the decision on which is not reported.

*F. B. Cutting*, for the defendant Emeric.

*J. Larocque*, for the plaintiffs.

BY THE COURT. OAKLEY, CH. J.—On the case being moved for argument, the plaintiffs produced, and proposed to read, an exemplification in due form, of their act of incorporation by the legislature of the State of South Carolina; and the first question is as to the admission of this document.

We think they have a right to produce it at the argument. It ought, no doubt, to have been proved at the trial, and the omission to require it on the part of the judge, was erroneous; but it is a well settled and useful practice, in respect of documents which speak for themselves, and on which no questions can arise except such as are apparent on their face, to permit them to be produced on the argument, when they have been inadvertently or unadvisedly omitted at the trial. As for example, the record of a judgment, when the execution only was produced at the trial. If it be apparent that there is any surprise upon the adverse party, or that there was or is any point in his case which is prejudiced, or has been weakened by the omission of the evidence at the proper time, it will not be received at the argument. But it is surely not worth while to send this cause back for another trial, merely to have this document, on which no question arises, given in evidence.

2. As to the competency of Davenne. The plaintiff by the code, was entitled to examine him as a witness against his co-defendant. (Section 390, 397.) Neither is he a person for whose

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immediate benefit the suit was prosecuted, within the meaning of section 399 of the code, if he had not been a party to the suit. That section applies only to a person into whose hands the money collected in the suit will necessarily go when it is received, or who might take it from the sheriff or the attorney as his own. It does not apply where the money cannot immediately, though it may ultimately go into his hands, as in the case of a stockholder in a suit brought by a corporation.

New trial denied.

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 LEGGETT v. MOTT.'

## HAIGHT v. PRINCE.(a)

The party deeming himself aggrieved by the report of referees, may appeal at once to the general term, from the judgment entered on the report, on the matters of law involved.

Or, he may apply to a judge for an order staying proceedings on the report, with a view to move for a *rehearing*. The judge will grant a stay with or without terms, or will refuse it, as he may deem just.

Where a report of referees is complained of as against evidence, the party has no redress except by a motion for a rehearing.

If a stay of proceedings be obtained, the party must proceed to settle his case, and bring it to a hearing at the special term.

The court at the special term, may in its discretion, consider and determine the errors of law alleged, as well as the weight of evidence; but where matters of law alone are involved, the party complaining of the report will, in general, be required to appeal at once to the general term.

From the order of the judge at the special term, granting or denying the motion for a rehearing on the referees' report, an appeal may be brought to the general term, which will be heard with other calendar causes.

May 29, 1850

THE questions arising in the first case, appear in the opinion of the court.

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(a) In note at the end of the principal case. And see *Lusk v. Lusk*, 4 Howard's Pr. Rep. 418; *Graham v. Milliman*, ib. 435.

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*C. Nagle*, for the plaintiff.

*A. L. Brown*, for the defendant.

BY THE COURT. SANDFORD, J.—In the case of *Haight v. Prince*, it was held by Campbell, J., after consulting Duer and Mason, Justices, that a report of a referee upon the whole issue, might be brought before the special term on a motion for a rehearing, when such order might be made, granting or denying the application, as to the judge should seem just. (2 Code Rep. 95.) The question being presented in this case in our branch of the court, we have conferred with our associates, (the six justices being present,) and it is the unanimous conclusion of the court, that the decision of Campbell, J., was correct. Whether the court will look into the matters of law, as well as of fact, arising upon the report of the referee, and direct a rehearing in respect of erroneous rulings of the law; will of course be in the discretion of the court, at the special term. Where the report is complained of as being contrary to the evidence, an examination of the legal points involved will generally be convenient and proper in connection with the argument on the evidence. Where however, the report is assailed in respect of its legal conclusions alone, the judge will be inclined to refuse a stay of proceedings with a view to a motion for a rehearing, and will leave the party to his remedy by appeal from the judgment.

The considerations which lead us to this result, will be briefly stated. The amended code of 1849, allows of no appeal from a judgment, upon the facts involved. The appeal to the general term from a judgment, is limited to matters of law. (Am. Code, § 348.) This would cut off entirely, any review of the finding of a referee upon the facts, or of the verdict of a jury, or the decision of a judge upon the facts on a trial without a jury; unless there be some mode of reaching it, other than an appeal from the judgment. In *Droz v. Lakey*,<sup>(a)</sup> we decided in January last, that a motion to set aside a verdict as against evidence, might be made at the special term, on a case settled in the usual

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<sup>(a)</sup> Ante, page 681.

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manner; and that such motion might be made after judgment, the party obtaining a stay of proceedings for the purpose. We see no good reason, why the motion may not be made, without any formal case, before the judge who tried the suit, founded on his notes of the testimony, if he think proper so to direct. As to reports of referees, the code it appears to us, is explicit in making a provision independent of an appeal in the first instance. Section 272, after providing that the report may be reviewed in like manner as the decision of the court on a trial, enacts that a *re-hearing* may also be granted by the court. A rehearing, as we understand it, is obtained on a motion only; and this is brought on before a judge, either at chambers or at special term. If it be for a new trial on the merits, it must be moved before the judge, *in court*, i. e. at the special term. (Amended Code, § 400, 401, and 350.)

We are referred to the 24th rule of the supreme court, adopted in August last, as imperatively restricting the examination of the reports of referees, to an appeal to be heard at the general term. As this rule, in the broad application claimed for it, would conflict with the latter part of section 272 of the amended code, allowing a re-hearing, we think it was intended to apply, as in its literal terms it does apply, only to a *review* of the referees' report, for which purpose a case must be made; and as the appeal is limited to the law of the case, it follows that rule 24 applies only to the review of the report of a referee, on matters of law. It is nevertheless a convenient practice to make a case on which to found a motion for a rehearing, in the manner prescribed by the rule of the supreme court, and that course will be required in our court in future.

The practice therefore in respect of reports of referees, may be thus stated. The party deeming himself aggrieved by such a report, may prepare his case, and appeal from the judgment on the matters of law involved. Or he may apply to a judge of the court, for an order to stay the proceedings on the referee's report, for the purpose of moving for a rehearing. The judge will exercise a discretion, as to staying the proceedings, regulated by the nature of the action, the points proposed to be raised, and the danger of loss if collection of the demand be delayed; and he



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may impose terms on granting a stay. If the report be complained of as against evidence, there is no redress, except by the motion for a re-hearing. On obtaining a stay, the party must proceed to make and settle his case, and bring it on to be heard before the court at special term. An order will thereupon be made, either granting or denying the motion for a re-hearing. From this *order* either party may appeal to the general term, as provided in section 349 of the amended code. And such appeals will be heard, with other calendar causes, at the general term.

Rule accordingly.

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*Note.*—The opinion of CAMPBELL, J., in *Haight v. Prince*, referred to in this decision, was as follows :

CAMPBELL, J. An order was granted staying the proceedings of the plaintiff for twenty days, to enable the defendant to prepare and serve a case. The cause was heard before a referee, who reported in favor of the plaintiff. The report has been filed, and a motion is now made to vacate the order staying the proceedings of the plaintiff, or to modify it so far as to allow the plaintiff to enter judgment, and also that an additional allowance be made to the plaintiff for costs. Section 272 of the code provides that the report of referees upon the whole issue, shall stand as the decision of the court, and judgment may be entered, and the decision of the referees may be excepted to and reviewed in like manner as if the action had been tried by the court; but the same section also provides that a rehearing may be granted by the court in which the judgment is entered. Section 268 provides that where a judgment is entered upon the decision of the court after a trial by the court, (which trial must be before a single judge, § 255) either party desiring a review upon the evidence appearing on trial either of the questions of fact or of law may at any time within ten days after notice of judgment make a case which shall be settled according to the existing practice. Section 278 provides that judgment upon an issue of law or of fact shall in the first instance be entered upon the direction of a single judge or report of referees, subject to review at the general term.

It would seem that where a review of a report of referees is sought, that review must be had before the general term, and to obtain it an appeal must be had, and security given, the same as in cases of appeal from the decisions of the court at special term. But section 272 gives an alternative relief, and provides that a rehearing may be granted by the court in which the judgment is entered.

This last section, as originally reported by the commissioners of the code, was without this latter provision. The clause authorizing the court in which judgment should be entered on the report of referees, to direct that the case be re-heard, was one of the amendments made in the legislature. It may often occur that referees may err on points of law, and their errors may be corrected and the report sent back by a judge at special term, in a shorter time and at much less expense than if the case was reviewed at a general term. I think it must follow that the party who feels aggrieved by the report of the referees, has his election either to appeal to the

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**Matter of Smethurst.**

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**IN THE MATTER OF HENRY D. SMETHURST.**

A judge under section 302 of the code, has power to punish as for a contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt, may therefore properly be made returnable before him, at his office.

Although the code gives the power of punishing disobedience of his orders to the judge, reference must be had to the revised statutes as to the mode in which that power is to be exercised. (2 R. S. 535.)

Under this statute a judge, upon due proof, may, in his discretion, issue an attachment in the first instance, against the party accused, to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court.

It seems, that in the first judicial district, the ordinary practice is, to give notice of motion for an attachment, or obtain an order to show cause.

Whether the affidavits upon which an attachment is issued, are sufficient to warrant its issuing, is a matter that cannot be reviewed on habeas corpus.

June, 1850.

THIS was a habeas corpus, granted to inquire into the cause of the imprisonment of the petitioner, Henry D. Smethurst.

A judgment had been recovered against the prisoner, in the supreme court, in favor of one David Osterhout, and upon proof of an execution on such judgment having been returned unsatisfied, the usual order was made by Mr. Justice Harris, requir-

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general term for a review, or to apply to the special term for an order that the cause be re-heard. It may be that in case such an application should be made, the party applying should point out the particular parts of the proceedings which he considers erroneous, and that the re-hearing should be confined to those parts.

The facts in this cause are not before me, and I am not enabled to form any opinion as to the merits, and as I shall not at present vacate the order staying the plaintiff's proceedings, and as the cause may be ordered to be re-heard, it would not be advisable at present to pass upon the question of extra allowance for costs.

The defendant must settle the case before the referee without delay, and must within ten days make his election to apply for a re-hearing, or to appeal in order to obtain a review at the general term.

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ing him to appear before a referee, and make discovery on oath concerning his property. He appeared in pursuance of the order, with his counsel, and after the examination had been continued some time, a motion was made by his counsel for an adjournment until the next day, which was denied by the referee, and the counsel thereupon took his hat and left the room. The prisoner then peremptorily refused to answer any further questions, in consequence of the absence of his counsel, and shortly after he also left the room. Upon proof by affidavit, of these facts, the judge issued an attachment, directed to the sheriff of this city and county, by which he was commanded to attach the defendant so as to have him before the judge, at his office in the city of Albany, on a day therein named, there to answer, as well touching the contempt which was alleged he had committed, as also such other matters as should be then laid to his charge, &c. A copy of the affidavits on which the attachment was granted, was served on the prisoner simultaneously with the attachment.

He then sued out his habeas corpus, and notice having been given to the plaintiff in the suit, the case came on to be heard on the sheriff's return.

The prisoner, in reply to the return, alleged that the attachment was illegal and void :

1. Because it was granted *ex parte*, without the service of any previous notice or order requiring him to show cause why the process should not be issued.

2. Because the affidavits on which the same was granted, did not show sufficient cause for the issuing of the same; and

3. Because it was void on its face.

*N. B. Blunt*, for the prisoner.

*A. K. Hadley*, for the plaintiff in the suit.

MASON, J.—The last objection I shall consider first. Is the attachment void on its face? The counsel for the prisoner earnestly insisted that it was so, because it was made returnable before Justice Harris, *at his office*, whereas it should have been

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before the court at a special term, and he referred to the sections of the revised statutes on the subject of contempts, (2 R. S. 534, &c.) which provide in all cases for the party being brought before the court, and not before a judge. The answer to this objection is very simple and decisive. The 302d section of the code, in express terms, confers on the judge, power to punish as for a contempt, all disobedience of orders made by him in these proceedings supplementary to the execution. The revised statutes gave this power of punishing for contempt only to courts of record; and attachments were then necessarily returnable before the court. A judge now, under the code, having this power conferred upon him in this special case, cannot exercise the power unless the person was brought before him. The court, as such, cannot punish, because no contempt is shown to its authority; and no power is given to it to punish for contempt of the orders of the judge. If the party, therefore, cannot be brought before the judge on the attachment, he cannot be punished at all, and this section of the statute is a dead letter. This objection, therefore, must be overruled.

It was also insisted that the attachment was illegally issued, because no order to show cause was previously served on the defendant.

It was properly urged by the counsel for the defendant, and assented to by the opposing counsel, that although the code gives the power of punishing disobedience of his orders to the judge, we must refer to the revised statutes as to the mode in which that power is to be exercised.

The objection of the learned counsel was founded on the third section of the act in relation to proceedings as for contempts to enforce civil remedies, (2 R. S. 535,) which provides that where the misconduct mentioned in the first section is not committed in the presence of the court, the court shall be satisfied by due proof by affidavit of the facts charged, and shall cause a copy of such affidavits to be served on the party accused, a reasonable time, to enable him to make his defence, except in cases of disobedience to any rule requiring the payment of money, or of disobedience to any subpoena.

The fourth section authorizes a precept of commitment in

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case of disobedience of an order requiring the payment of a sum of money ; and the fifth section provides that in all other cases “ the court shall *either* grant an order on the accused person to show cause, at some reasonable time to be therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party and to bring him before the court to answer for such misconduct.”

It was insisted that according to the plain meaning of the third section, an attachment cannot issue until the party complained of has been afforded an opportunity of being heard in his defence, and that the proper and ordinary mode of doing this is by an order to show cause.

This would be the case, if an attachment were the punishment of the offence, and was founded upon a final adjudication of the matter by the court. But it is not pretended that this is the case ; all that the learned counsel insisted on in his argument, was that an attachment was a preliminary adjudication that the party had been guilty of a contempt.

It would be more correct to say, that like an order to show cause, it is evidence that in the opinion of the court the party applying for it has made out a *prima facie* case—rendering it proper that the party accused should be called on for his defence, or in the language of the fifth section, to answer for such misconduct. It is only a mode of bringing him before the court.

The evident meaning of the third and fifth sections taken together, it appears to me, is this—a party shall not be punished for any misconduct not committed in the presence of the court, except in the cases specially mentioned, unless the same shall be proved by affidavit to the satisfaction of the court, and unless after having been served with the affidavits containing such proof, the accused party shall have been heard in his defence, and he is to be called upon to make his defence either by an order to show cause why he should not be punished for his alleged misconduct, or by an attachment arresting him and bringing him before the court to answer for such misconduct. In both cases, the affidavits must be served on him. When an order to show cause why he should not be punished for his mis-

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conduct is granted, he answers by counter affidavits. If an attachment be granted, he answers to interrogatories then propounded to him.

The third section declares the manner in which the complainant is to prove his charge, and the general principle that the accused is not to be condemned unheard.

The fifth section provides two modes in which he may be called upon to defend himself. If the first mode is adopted, and no sufficient cause is shown, he may then be punished without any further proceedings, and this, perhaps, would be the most appropriate mode in some of the instances of misconduct specified in the first section, as in the case of a juror charged with improperly conversing with parties to a suit to be tried at the court for which he is summoned. If the latter method, by attachment, is pursued, unless the contempt is admitted, the party is punished only in case he shall be found guilty after his answers to the interrogatories shall have been taken, and such other proofs contradictory and in confirmation thereof shall have been received.

I am of opinion therefore, from the best examination I have been able to give to the subject, that the course pursued in this case of issuing the attachment in the first instance, and serving with it the affidavits on which it was granted, was warranted by the provisions of the statute. It is also in accordance with the view taken by the supreme court in *The People v. Nevins*, (1 Hill, 168,) and by the chancellor in the *Albany City Bank v. Schermerhorn*, (9 Paige, 372.) In this last case, however, an order to show cause why an attachment should not issue, had been previously served, and the question now before me was not raised.

It is, I apprehend, the ordinary course in this district, to give notice of motion for an attachment, or obtain an order to show cause, and it is, as a general rule, the most advisable course. Cases may, however, arise, in which it may be important for the rights of the party prejudiced by the alleged contempt, that the defendant be brought into court on an attachment in the first instance, and for that reason, doubtless, the statute has bestowed power to do so on the court or the judge, as I have endeavored

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Matter of Smethurst.

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to show. It is a matter resting in his discretion, with the exercise of which I have no right to interfere.

The third and last objection taken, viz., that the affidavits on which the attachment was issued were not sufficient to warrant its being given, is one of which I cannot take notice on this application. Judge Harris had jurisdiction both of the subject matter in controversy and of the person of the defendant. If he erred, it was an error of judgment as to the sufficiency of the evidence, to be corrected on motion to himself or by appeal; the attachment was in the usual form—was issued in a case allowed by law, and was authorized by the provisions of the law; so that it does not fall within the cases specified in the forty-first section (2 R. S. 568,) in which prisoners, in custody by virtue of civil process, may be discharged. If upon the return to a writ of habeas corpus, the officer issuing it can sit in judgment upon the correctness of the legal conclusions of a judge or court, in the lawful discharge of his or their duty, any inferior officer may annul or reverse the judgment and proceedings of the highest court, when they in the least affect the liberty of the citizen. (*The People v. Nevins*, 1 Hill, 159.) It is not for such purposes that the right of habeas corpus is secured, and the provisions of the act sufficiently guard against such a construction being put upon it.

Upon the whole, I see no ground upon which I can interfere in this case on behalf of the prisoner, and he must be remanded.

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TRACY v. LELAND.

The concealment, removal and disposal of a piano by a female, does not subject her to be held to bail, under the 179th section of the code.

A female can be arrested only for wilfully, wantonly, or maliciously injuring property; but not for a detention or conversion of it.

June, 1850.

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Tracy v. Leland.

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THIS was an action brought to recover the possession of personal property wrongfully detained. Part of the property claimed, viz. a rosewood piano, has been concealed or removed, and disposed of by the defendant, so that it could not be found by the sheriff. On due proof of these facts, the plaintiff obtained an order of arrest, under which the defendant has been actually arrested. A motion is now made in her behalf to discharge her, upon the ground, among others, that this is not a case in which a female can be arrested.

*E. Ward*, for the defendant.

*C. Tracy*, for the plaintiff.

MASON, J., (after consultation with DUER and CAMPBELL, J. J.)—The decision of this question depends upon the construction to be given to the 189th section of the code. The third subdivision of that section expressly authorizes the arrest of a defendant in cases like the present, but with the proviso that no female “shall be arrested in any action except for a *wilful injury* to person, character, or property.” If this case is embraced in either of the exceptions, it must be in the last, a wilful injury to property. But it is difficult to understand how the mere detention or concealment of a piece of furniture is a wilful injury to it. It may be preserved with the utmost care, although kept out of the reach of the plaintiff. Had the defendant broken it to pieces, or damaged it intentionally, so that its value was thereby lessened or destroyed, that would be a wilful injury within the meaning of the act. But nothing of this kind is pretended. The plaintiff rests his right to an arrest, on the sole ground that a wrongful concealment and withholding of the property, is in itself a wilful injury to it. I cannot so understand it. The two things are in their nature entirely different, and the distinction between them is clearly stated in this very section, which authorizes an arrest generally, “where the action is for an injury to person or character, or for *injuring*, or for wrongfully taking, detaining, or converting property.” Injuring property, therefore, is not within the meaning of this



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Tracy v. Leland.

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section, the same as taking, detaining, or converting it. A female can, however, be arrested only for injuring property, and not for taking, detaining, or converting it; and even then it is not for every injury done to it, but only for a wilful, or wanton and malicious injury. No doubt an injury is done to the plaintiff himself, by withholding from him his property, and the defendant is guilty of a wrong, or in the old phraseology, of a tort in so doing;—but that is certainly very different from an injury to the particular piece of property itself.

I should not have thought it necessary to have dwelt upon this at such length, if it were not for the case of *Starr v. Kent*, 2 Code Rep. 30, which the counsel for the plaintiff pressed with much earnestness in support of his position. That was a motion to discharge the defendant, who was a female, from arrest; and according to the report, it was contended on behalf of the plaintiff, that “the concealing or removing of the property, so that it could not be found or taken by the sheriff, was a wilful injury to the plaintiff’s *property in the property* so removed or concealed—and of that opinion,” the report adds, “was his honor Judge Daly, and the motion was denied.” His honor did not, however, give any written opinion himself, and I cannot but think that there must be some mistake or omission, or misapprehension of some important fact, on which the decision of the judge was founded.

The report, if it mean any thing, means that the detaining of property is a wilful injury to the estate or interest of the plaintiff, in the property detained, and therefore subjects a female who detains it, to arrest; thus giving an entirely different signification to the word “property” from that evidently intended by the code. With the greatest respect, therefore, for the learned judge, I cannot regard the report of his decision as an authority for the position which it purports to sustain.

This view of the principal question renders it unnecessary to consider the other questions discussed on the argument.

The motion to discharge the defendant must be granted on the ground that the facts do not warrant her arrest under the code, with ten dollars costs; but on condition that the defendant stipulate not to bring any action.

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New York and Erie R. R. Co. v. Cook.

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**THE NEW YORK AND ERIE RAIL ROAD COMPANY v. COOK.**

Upon a case made, a party cannot move to enter a non-suit, or for a new trial, on a ground not distinctly taken at the trial, if it be such as might have been obviated by proof, had it been presented at the trial.

A stockholder of a stock corporation, is a competent witness for the corporation under the recent statutes.

(Before OAKLEY, CH. J., and PAINE, J.)

May 24 ; June 8, 1850.

THIS was an action against a stockholder, to recover calls on his shares made by order of the board of directors.

On the trial, Morris Ketchum was called as a witness for the plaintiffs, and it being admitted that he was then a stockholder of the company, the defendant objected to his competency, the objection was overruled, and the defendant excepted.

After the plaintiffs rested, the defendant moved for a non-suit, which was denied, and an exception taken. The plaintiffs had a verdict, and the defendants on a case, moved for a new trial. The opinion of the court states all that is material to the points reported.

*S. Sanxay*, for the defendant.

*H. E. Davies*, for the plaintiffs.

BY THE COURT.—OAKLEY, CH. J.—We have no doubt that Mr. Ketchum was a competent witness, under the recent provisions of law on that subject.

At the trial, the defendant moved for a non-suit, without specifying any ground for it. He now states, as a ground for a non-suit, that some material allegations were not made in the declaration, and that others were not proved. As for example, that there was no proof of the organization of the company, and none that the defendant had received notice of the calls made on the stock, or that any notice was given as required by the charter. The others are of the same description.

It is a well established rule, that a party cannot move for a

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Smith v. Lynes.

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new trial, or for leave to enter a non-suit, on a point not distinctly taken at the trial, if it be such a point as might have been obviated by proof, if it had been then raised. In this case, every ground now presented to us, is of that character. All might, as we cannot fail to see, have been obviated, either by amending the declaration or by evidence.

If the objections were in their nature such that they could not have been obviated if made at the trial, probably a different rule would be applied.

New trial denied.

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SMITH v. LYNES.

On appeal to the general term, from a judgment at the special term, the costs to be allowed, are those expressed in the sixth subdivision of section three hundred and seven of the code of procedure.

June 8th, 1849.

THIS case came before the court by way of appeal from the adjustment of costs by the clerk. There had been an appeal to the general term, from a judgment entered on verdict at the special term; and the judgment below was affirmed. The appellant claimed that the respondent was not entitled to costs, on the ground that costs were expressly excluded by the latter clause in the sixth subdivision of section 307 of the code.

*C. W. Sandford*, for the appellant.

*B. W. Bonney*, for the respondent.

BY THE COURT.—There are two classes of appeals in our present practice, first, from *orders*, and secondly, from *judgments*. Section 307 of the amended code, provides that, “when allowed, costs shall be as follows”:—Eight classes of cases or stages of suits are then enumerated. The sixth clause of the section

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Smith v. Lynes.

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reads thus:—"To either party on appeal, excepting to the court of appeals, before argument, fifteen dollars; for argument, thirty dollars; but this provision shall not apply to appeals in cases other than those mentioned in section 349."

The 349th section, referred to, is the one providing for appeals from orders, as distinguished from judgments. Therefore, if literally carried out, this sixth clause of section 307 would deprive the successful party of all costs on an appeal to the general term, from a final judgment. This must be contrary to the intent of the legislature. There are other clauses in the code, which certainly contemplate the allowance of costs on such an appeal in certain cases.

The difficulty is, that the section referred to so distinctly in the sixth clause, is pertinent; it relates to an entire class of appeals; and it is embarrassing for a court to say that the legislature did not mean what is so plainly and unequivocally written. It is most probable that an error was made in engrossing the code, which causes the difficulty.

The question has been considered in the supreme court, by Judge Barculo, in the second, and by Judge Harris, in the third district; and both have decided that the exception made by the concluding paragraph of the sixth clause must be rejected as repugnant to other parts of the code, and the prevailing party is entitled to costs on an appeal from a judgment. (*Livingston v. Miller*, 4 Howard's Practice R., 42; *Wilson v. Allen*, ib. 54.)

Uniformity of decision on the subject, is very desirable, and we incline to conform our views to those of the judges whose decisions we have cited. We therefore advise the clerk to insert the costs of the appeal in the record of judgment. If this be wrong, it will be an error which may be examined by the court of appeals.

Order accordingly.

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Bulkeley v. Keteltas.

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**BULKELEY v. KETELTAS and others.**

When a party obtains a postponement of the trial to a subsequent term on payment of costs, on the cause being moved for trial ; on his omission to pay the same, the adverse party may insist on having the trial proceed ; or he waive that right, and the court, on motion, will compel the moving party to pay them.

If, however, the party entitled to receive such costs, neglect to apply for an order for their payment without delay after the term ; his costs of the term will abide the event of the suit.

June 29, 1850.

AT the June term in 1849, on this cause being called for trial in its order on the calendar, it was postponed to the next trial term on the plaintiff's application, on payment of costs. The costs were not paid during the term, nor subsequently. The defendants, who appeared separately, afterwards, without any motion or direction of the court, entered an order in favor of each, requiring the plaintiff to pay to each the costs of the term. At the December term 1849, the cause was tried and the plaintiff recovered a verdict against all of the defendants. The defendants claimed on adjusting the costs, to have their costs of June term deducted from the plaintiff's bill, or to have them set off ; while the plaintiff contended that the orders entered for the payment of those costs, were irregular and void.

*C. B. Smith, C. H. Smith, and J. H. Brush*, for the defendants.

*L. E. Bulkeley and J. T. Brady*, for the plaintiff.

MASON, J.—The only rule granted by the court, on the plaintiff's application to put off the trial, was the usual rule in such cases, that the cause go off on payment of the costs of the term by the plaintiff. These costs were payable instant, their payment being the condition on which the trial was put off ; and if they were not paid, the court would have allowed the defendants, if they had themselves noticed the cause as they may do under the code, to have brought it on for trial. The defendants

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**Bulkeley v. Keteltas.**

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however might have waived this right to proceed, and the court would then on application, have made a rule requiring the plaintiffs to pay the costs. In the supreme court this motion must have been made at a special term, the judge at nisi prius under the old practice not having the power to make such an order. In this court however all trials are at bar, and the application in this case might have been made either to the judge who was holding the trial term, and who conditionally postponed the cause, or to the judge holding chambers, and the payment if directed might have been enforced by attachment. If however, the party entitled to the costs neither insists on the trial proceeding because the costs imposed as a condition of its postponement are not paid, nor applies for a rule or order requiring the party obtaining the postponement to pay the costs at the earliest opportunity, in such case the costs abide the event of the suit. This appears from the authorities to have been the practice of the supreme court. (*Judson v. Pell*, 19 John. R. 270; *Kirby v. Sisson*, 1 Wend. 83; *Mix v. Brisban*, 2 Wend. 286; *Bagley v. Ostrom*, 5 Hill, 516.)

The defendants however, instead of insisting upon bringing on the cause, or asking for a rule on the plaintiff requiring him to pay them, of their own motion draw up separate rules in their own favor, requiring the plaintiff to pay to each of them the costs of the term and witness fees. This they had no right to do. Even if the rule actually granted by the court, imposed on the plaintiff as a condition of the postponement of the trial the payment of costs to each of the defendants, it plainly did not require him to do so; and as it is not pretended by the defendants that any other rule was granted by the judge than merely that the cause go off on payment of costs, the rules taken out by the defendants Smith & Brush were entirely unauthorized. They are therefore set aside as null and void. And as a year has elapsed since the cause was put off, and neither of the defendants have applied for an order requiring the plaintiffs to pay the costs, they must abide the event of the suit. The disposition made of the principal question involved in this motion, renders it unnecessary to decide whether under the rule postponing the cause the defendants are entitled each to a separate bill of costs. It

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Minturn v. Main.

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will be time enough to settle that point if the defendants shall ultimately prevail on the merits ; and the remaining part of the motion, to wit for a set-off, also falls to the ground.

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**MINTURN v. MAIN & Co., and several other suits in favor of the same plaintiff.**

Where a stipulation was given in several suits depending on the same principal point, to the effect that all should abide the event of the one first tried, and the suits were noticed for trial several terms thereafter, though notes of issue were filed in one only ; it was held, that the plaintiff on recovering might tax a counsel fee for attending at those terms in each of the causes.

The stipulation provided for the entry of judgment, in case of a recovery, for \$235, with interest, in one of the causes. When the judgment came to be entered, the interest made the amount over \$250. Held, that the judgment was properly entered for the entire sum, and the costs were to be taxed as upon a recovery for over \$250.

(Before OAKLEY, CH. J., and CAMPBELL and PAINE, J. J.)

July 15, 1850.

THE facts appear in the opinion of the court.

BY THE COURT. OAKLEY, CH. J.—Several suits were instituted by the plaintiffs, who were auctioneers in the city of New York, against the defendants and others respectively, to recover the amounts of purchases by them at an auction sale. After the causes were at issue, and after they had been noticed for trial, for the October term, in 1848, but before notes of issue had been filed, a stipulation was entered into between the parties, by which it was agreed that the several suits should abide the event of the first one tried, which was ultimately that of the defendants, Main & Co. The causes were also noticed again for the December and January term following, but at neither of the three terms were notes of issue filed, except in the case against the defendants Main & Co. The suit resulted in favor of the plaintiffs. Upon the taxation of costs, it was urged that

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Stone v. Carlan.

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the plaintiffs were not entitled to the counsel fee for attendance in those causes which were not placed on the calendar. The taxing officer, however, allowed it. The defendants appeal from that decision.

We see no reason for disturbing the decision of the taxing officer. We think the costs properly allowed. The causes having been noticed for trial, the plaintiffs had a right to hold the defendants to the effect of the notice. The stipulation entered into, was purely for the benefit of the defendants. It is the practice to construe the allowance of counsel fees for attendance at the terms, in a liberal way. Oftentimes terms fall through from various causes, but that is never deemed to be a good reason for rejecting this item in the bill of costs.

Another question comes before us upon the taxation in one of the cases, that of Seaman & Brown. It was stipulated between the parties, that judgment might be entered up in all the suits for the amount annexed to each cause, with interest from May, 1848. In the suit against Seaman & Brown, the amount annexed was \$235, but with the interest amounted to over \$250, and the costs were taxed on the higher scale, agreeably to the latter amount. We think the principle of taxation adopted, was the correct one. The stipulation is, that judgment may be entered for the amount due, with interest. Of course, the interest was to be estimated, and added to the verdict, and costs should be taxed accordingly.

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STONE v. CARLAN and others.

An appeal from an order granting an injunction, does not stay the operation of the injunction; and if the defendant violate it pending the appeal, an attachment will issue against him.

October, 1850.

An injunction was granted in this case, restraining the defendants from using certain names and designations on their



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Kanouse v. Martin.

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carriages. They appealed to the general term from the order of the justice granting the injunction, and pending the appeal, continued to use the prohibited names. An order was thereupon made, requiring them to show cause why an attachment should not issue.

*R. D. Holmes*, for the defendants.

*H. A. Mott*, for the plaintiff.

PAINE, J.—The defendants claim that by their appeal proceedings are stayed, and that this suspends the effect of the injunction. This is an entire mistake. The sections of the code cited, (§ 334, 342 and 348,) do not apply to such appeals as this, which is from an order, not from a judgment; and on which no security is given. The injunction must be obeyed so long as it is in force, and as it appears to have been violated, an attachment must issue.

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KANOUSE v. MARTIN.

An appeal from a judgment of this court to the court of appeals, is a new suit, within the meaning of the code of procedure in respect of costs; and the costs recoverable on an appeal taken under the code, are to be taxed according to its provisions.

Where such an appeal is dismissed with costs, for want of prosecution, the respondent is entitled to recover twenty-five dollars, together with his disbursements.

Where an appeal is dismissed with costs on motion, (the cause not having been argued on the merits, or dismissed on being called on the calendar,) the appellant is not entitled to the fee of fifty dollars for argument prescribed by the code, nor to the term fee given for attending when the cause is not reached, the suit being dismissed at the first term.

Nov. 6, 1850.

MOTION to correct the adjustment of costs made by the clerk, on two appeals taken by Kanouse, to the court of appeals, from a judgment of this court. The circumstances ap-

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Kanouse v. Martin.

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pear in the opinion. The clerk taxed on the first appeal, twenty-five dollars, besides disbursements. On the second appeal, in addition to this, he taxed a fee of fifty dollars "for argument," and ten dollars for a term fee for attending at the term when the suit was dismissed.

The appellant moved to correct the adjustment.

*A. S. Garr*, for the appellant.

*J. M. Martin*, for the respondent.

MASON, J., (after advising with Sandford and Duer, J. J.)—The first question to be determined is, by what law are the costs of the appeals in this suit to be regulated.

It is contended by the plaintiff in error, that as the original suit was brought long before the passage of the code, the costs are to be adjusted under the former law, although the appeals were not brought until the present year. And in support of this position, it is argued that the code, by the eighth section, is declared to relate to civil actions commenced after the first day of July, 1848, except when otherwise provided therein; that a writ of error, and by analogy an appeal, is not an action; and that none of the provisions of the code relating to costs, except section 315, are applied to existing suits; that therefore none of the other provisions on that subject, can have any application to the present case.

I think that there are several answers to this argument. In the first place, by section 323, writs of error in civil actions are abolished, and the only mode of reviewing a judgment or order in a civil action, is by appeal. If the writ of error itself is taken away, it would seem that the attornies fees for prosecuting it, must fall to the ground. If the proceeding itself, which is the principal, is abolished, the compensation for conducting it, which is a mere incident, cannot remain. Secondly, although an appeal, or writ of error, in some aspects, may not be deemed a new action, but only a proceeding in an action already existing, yet in other respects it is a new suit. When judgment is perfected in an inferior tribunal, the suit, properly speaking, is at an end.

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Kanouse v. Martin.

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The subsequent proceedings in the same court are only for enforcing the judgment. On an appeal, a writ of error, new proceedings are commenced before a different tribunal, for the purpose not of carrying that judgment into effect, but of defeating or reversing it. The defendant if he appeals, now becomes the plaintiff, and the costs under either law are entirely different from those prescribed in the courts below. The fee bill itself under the old law was framed on the idea that a writ of error or an appeal was a new proceeding, since a retaining fee was allowed, and new and different rates of compensation fixed. An appeal from a vice chancellor to the chancellor, under the old system, was considered a new proceeding so as to allow of a new retaining fee, although the original suit and the appeal were both in the same court.

The 8th section of the code referred to by the appellant's counsel, appears however to decide the question. It declares in so many words, that the several titles except the first four, relate to actions in the supreme and other courts specified, *and to appeals to the court of appeals* ; recognizing the distinction taken by the counsel between actions and appeals ; that is not only to *actions* brought after July 1848, but to appeals also brought after that time, without reference to the time when the actions may have been brought. It does not say to appeals to be brought in those actions, but to appeals generally, so that we cannot confine the operation of any of the provisions of the code respecting appeals or the costs therein, to appeals in suits brought after July 1848, without a plain violation of the statute.

The next question is, what charges are allowed on these appeals.

The first appeal was dismissed for want of prosecution, with costs.

The respondent claims the sum of twenty five dollars besides disbursements. This is the statutory allowance for costs on appeal to the court of appeals before argument, and the only allowance. The respondent is entitled to this or nothing.

The second appeal was dismissed with costs of the appeal and ten dollars costs of the motion.

The same item of twenty five dollars must here be allowed

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Gallagher v. Egan.

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and the ten dollars specially given by the court. But nothing more.

The statute allows "for argument fifty dollars," but the cause was not argued, nor was the appeal dismissed when the cause was called in its order on the calendar, in which case if the respondent had appeared and been ready to argue, he would on default of the appellant, have been entitled to this fee. (*Reed v. Child*, 4 How. Pr. R. 125; *Slade v. Warren*, 1 Comst. 431.) But the appeal was dismissed on motion, and the allowance of ten dollars costs of the motion, excludes the idea of the allowance of the argument fee.

Neither is the charge of ten dollars for a term fee allowable. That is given as a compensation for attending the court, and waiting for the call of the cause, and is only chargeable when the cause continuing on the calendar, is not reached or is postponed. Here, the cause was dismissed, and the respondent discharged from his attendance.

The sum of sixty dollars must be deducted from the amount as adjusted by the clerk on the second appeal, and the adjustment of the costs on the first appeal is confirmed. No costs allowed to either party on this motion.

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GALLAGHER v. EGAN and others.

In a foreclosure suit, the court will permit the plaintiff, on receiving his debt and costs, to dismiss his suit, without paying costs to junior incumbrancers, who have appeared to protect their rights. So as to the mortgagor, personally liable for the debt, who has conveyed the mortgaged premises subject to its payment.

Where a sheriff serves with the summons, a notice of the objects of a suit for foreclosure, the plaintiff may tax for such service, as a necessary disbursement, the sum of thirty-seven and one-half cents, in addition to the sheriff's fee for serving the summons.

The sheriff is entitled to only one fee, of twelve and one-half cents, for returning a summons with his certificate of service.

Nov. 11, 1850.

APPLICATION by the plaintiff for leave to discontinue her

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Gallagher v. Egan.

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suit, on receiving her debt, interest and costs, without paying costs to the defendants, all of whom had appeared in the cause. The suit was for the foreclosure of a mortgage. The defendants, Power, Egan and Cassidy, were the mortgagors, personally liable for the debt, who had subsequently conveyed the premises to the defendant Sandford, who assumed the payment of the mortgage. The defendant McBarron was a judgment creditor of Sandford. He received the amount of his judgment, after he appeared in this suit. The owner of the equity of redemption offered to pay the plaintiff's debt, interest and costs; but the other defendants refused to suffer her to discontinue, unless she paid their costs.

A further question arose in reference to the taxation of costs, which is stated in the decision.

*J. M. Mason*, for the plaintiff.

*J. T. Doyle*, for McBarron.

*J. H. Power*, for Power and others.

*S. P. Nash*, for Sandford.

SANDFORD, J., after advising with all the other Justices of the court, decided with their concurrence, as follows:—The allowance of costs to the defendants on discontinuing a suit for the foreclosure of a mortgage, before judgment, appears to rest in the discretion of the court. The provision in the revised statutes to which I was referred, (2 R. S. 613, § 1,) is repealed by the code of procedure. Section 305 of the code, is confined to the actions mentioned in section 304, which does not apply to foreclosure suits, as is shown by the language of section 308. The provision in section 322, is limited to the plaintiff's costs on a settlement before judgment.

The allowance of costs being thus discretionary, there is no possible reason for granting costs to the mortgagors. It is their debt which the plaintiff is to receive on discontinuing. If the suit went to a decree, and there were a surplus, they could not

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Gallagher v. Egan.

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obtain their costs, either out of the surplus or against the other defendant.

As to McBarron, though it was proper for him to appear, it was not necessary ; and the case of *The Merchants Insurance Company v. Marvin*, (1 Paige, 557,) is an authority against granting him costs in this case.

A question was argued, in reference to the sheriff's fees charged in the plaintiff's costs. The views of the sheriff were presented by one of the counsel, and we have considered the matter. The sheriff charged in respect of each defendant, the following fees, viz. :—Serving the summons, fifty cents ; serving notice of the objects of the suit, (which was attached to the summons,) fifty cents ; returning the summons, thirteen cents ; mileage, six and one-fourth cents ; and, certificate of service of the notice, thirteen cents. The parties object to the certificate and return as a double charge for the same service ; and to the charge for serving the notice, as being a part of the duty included in serving the summons, and if not, then that no fee is provided for it by law.

There is no fee allowed by law for the sheriff's certificate of service, by that designation. This certificate is in fact his return, and the statute gives him twelve and a-half cents for returning a writ. The returning a writ, embraces as well the sheriff's statement of his acts under it, as the delivery of the writ to the clerk or attorney. The return and certificate are therefore to be charged as one service, at twelve and a-half cents.

The notice of the objects of the suit, in our view, is not a part of the process by which the suit is commenced. The plaintiff *may* serve such a notice, or a copy of the complaint, with the summons. He is not bound to serve either. The sheriff therefore does not serve the notice as a part of his official duty in serving process, and the fee for serving the summons does not cover the service of the notice. The law provides no specific fee for this service, whether made by the sheriff or by an unofficial person. We learn that in practice, these notices are now usually served by the sheriff, for the reason that every other person serving them, must make an affidavit that

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he knew the party served to be the person mentioned and described in the summons as the defendant therein. In foreclosure cases, it is necessary to serve such notices, under section 130 of the code; and the expense necessarily incurred in serving them, appears to be a reasonable disbursement which ought to be allowed to the plaintiff. Whether the service be made by the sheriff, or by any other person, is unimportant. When made by the former, the compensation for it is not allowed as sheriff's fees. It is given for an unofficial act, which could be done by any other person equally as well. The amount of this compensation, we think in analogy to the fee formerly allowed by statute for the same service in the late court of chancery, should be thirty-seven and a-half cents; and that sum will be taxed in future in this court, when shown to be a necessary and reasonable disbursement. No charge for the certificate of service will be allowed. It ought to be, and usually is, included in the certificate of the service of the summons; but if separately made, it will be paid for in the allowance for serving the notice.

Order accordingly.





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### ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

### ADMIRALTY.

See JURISDICTION, 1 to 3.

### AGENT.

See PRINCIPAL AND AGENT.

### AGREEMENT.

1. Where there was express authority from the directors to the principal officers of a corporation, to issue stock in exchange for three distinct classes of indebtedness, and those officers for a considerable period, had been in the habit of thus issuing stock, in exchange

for those, and for a fourth class not embraced in the express authority; and their acts had never been disclaimed or questioned by the directors, or the corporation; it was *held*, that their issue of stock in exchange for such fourth class of indebtedness, was valid and binding upon the corporation, and equally binding upon the creditor who accepted such stock. *Lohman v. New York and Erie R. R. Co.*  
39

2. One who exchanges his debt against a corporation, for capital stock issued by its principal officers, without inquiring as to their authority, is not at liberty to annul the contract, because their authority was not express, but was a full implied authority derived from the course of business, and from similar acts affirmed or acquiesced in.  
*id.*

3. Where the stock of a company was usually transferred on two distinct books, to the stock transferred on one of which share brokers attached a greater value than to that on the other; and a creditor agreed to exchange his debt for stock, on the officers stating that such stock could be transferred on the former; and after completing such exchange, the officers refused to allow a transfer of it to be entered on such book; it was held, the creditor could not for that cause rescind the exchange, but that his remedy was in an action for damages. *id.*

4. An infant is liable for money lent and advanced, which was lent in and about

- the purchase of necessities for the infant, and which was so applied directly by the lender, and under his directions. *Smith v. Oliphant*, 306
5. The action upon the infant's liability in such a case, may be brought for money lent and advanced. *id.*
  6. S. having a right to receive insurance money from C., or from parties who had insured C. for his benefit, assigned his right to N. The money was subsequently received by C. from the insurers. *Held*, that it was money had and received to the use of N., and not to the use of S., and that an action for money had and received, could not be maintained in the name of S. *Sandford v. Conant*, 143
  7. Money paid under a mutual mistake of facts, may be recovered back. *Merchants Bank v. McIntyre*, 431
  8. Where a draft on a bank was presented for payment by a remote indorsee, to whom it was paid, both parties being ignorant of the fact that the first indorsee to whom it was specially indorsed, had never indorsed the draft, but that a fictitious signature resembling his was placed on the draft; it was *held*, that on discovering the fraud, the bank could recover the amount from the party to whom it was paid. *id.*
  9. Where a debt is contracted by several persons, for a common purpose, and one of them pays the whole debt, he may sue each of the others separately at law, for his aliquot share of the debt; but he cannot single out a part of the number and maintain a joint action against them. *Parker v. Ellis*, 223.
  10. In equity, however, if either of the joint debtors is insolvent, he who has paid the debt has likewise a claim against each of those who are solvent, to pay the proportion which they ought, respectively, to bear of the loss arising from such insolvency. *id.*
  11. Money paid under a mistake of facts may be recovered back, in an action for money had and received. *Godard v. Merchants Bank*, 247  
[*Note*.—This case was affirmed in the court of appeals.]
  12. Where a draft, after having been protested for non-payment, is paid to the agent of the holder, by a third person, for the honor of the drawer, without his having seen the draft, but upon the representation of such agent that he has a genuine draft, and the draft afterwards turns out to be a forgery; the person paying it *supra protest*, may, after having given immediate notice of the forgery, recover back the amount paid by him, in an action against the agent, brought before such agent has paid over the money to his principal, and before his situation in respect to his principal has been in any manner changed. *id.*
  13. An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. *Watkins v. Halstead*, 311
  14. A promise made by a married woman to pay for goods purchased by her during coverture, is void; and the law will not raise an implied promise by her from such consideration. Neither will such precedent consideration support an express promise by her to pay the debt, made after her divorce from her husband. *id.*
  15. The doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation. *id.*
  16. A special justice of the city of New York, receiving an annual salary for his services in that capacity, cannot recover extra compensation for services performed on Sunday. *Palmer v. City of New York*, 318
  17. This is so especially, where he has, at the end of every quarter during his term of office, rendered an account against the corporation for the amount of his salary, and has received his pay, without making any claim for extra compensation. *id.*
  18. A public officer receiving a fixed salary for his services, cannot rightfully claim a compensation beyond his sala-

- ry, for performing a new duty, or one imposed upon him since the salary was fixed; much less if he accept the office with full knowledge of the resolution requiring the extra duties to be performed. *id.*
19. Where a debtor remits money to a third person, with directions to pay it to his creditor, and the latter, upon being informed of it, calls upon the remittee, who then positively promises to pay such money to the creditor, it is a valid promise, and will support an action in favor of the creditor. *Wyman v. Smith*, 331
20. Such a promise is not a promise to pay the debt of a third person, and is not therefore within the statute of frauds. It is a promise to pay money which the defendant had received for the use of the plaintiff, and is consequently binding. *id.*
21. Where repairs were made by the plaintiffs upon a vessel at various times during a period of several months, in pursuance of general orders to them to do whatever work they should from time to time be directed by the officers of the vessel to do; held, that the contract was not an entire and indivisible one, but that each job of work done constituted a separate debt, which might be enforced by the plaintiffs. *Rockefeller v. Thompson*, 395
22. Where the owners of city lots which had been sold for the non-payment of void assessments, redeemed the same by paying to the street commissioner the amounts for which the lots were sold, with interest and costs; *Held*, that the payments being voluntary, and not made under a mistake of fact, or of law, could not be recovered back, in an action against the city. *Fleetwood v. City of New York*, 475.
23. A void assessment constitutes no cloud upon the title; and the payment of such an assessment, by the owner of the property, cannot be considered compulsory. *id.*
24. The cases respecting duress of personal property, in which it has been held that payments made for its relief are involuntary, and may be recovered back, are inapplicable to real estate. *id.*
25. Where a party, without any legal compulsion or duress of goods, yields to the assertion of an adverse claim, by paying the amount, he cannot detract from the force of his concession, by protesting against the legality of the claim. In such a case the payment nullifies the protest. *id.*
26. The terms of a written contract which are free from ambiguity, cannot be varied or impaired by parol evidence, nor by proof of the subsequent acts of the parties. *Lowber v. Le Roy*, 202
27. Such acts are, in general, not admissible, except in cases of latent ambiguity in the written contract. *id.*
28. The admission of extrinsic evidence to show the condition of the subjects of the contract, and the circumstances under which it was made, rests on a different principle. *id.*
29. The folly or the wisdom of the contract, as one or another construction might be placed upon its terms, is a dangerous element to introduce into the interpretation of agreements. *id.*
30. In applying a contract to its subject matter, the popular meaning of the descriptive terms used must govern, where it is not inferrible from the contract or the subject, that such terms were used in some technical or other sense. *id.*
31. The word "assets," in its common acceptation, means "property." *id.*
32. The word "machinery," though more appropriate to a steam engine and its fixtures, than to a lead pipe machine or a rolling mill, is sufficiently extensive in its meaning to embrace both of the latter; and it was held to include them on the terms of the contract, and the existing facts to which the contract was applicable. *id.*
33. Where by a written agreement for dissolution of a partnership, which, among other property, owned a steam engine, a rolling mill, and a pipe machine; one of the partners was to take all the *machinery*, and it was clear

- upon the terms of the writing and the existing circumstances, that this included the steam engine and rolling mill, as well as the pipe machine; the court excluded parol evidence which was offered to prove, that the two former were not included in the *machinery*, but were to belong to another party; and as a part of the parol testimony, excluded a written list of assets, subsequently made by a clerk in the presence of the first named partner, and at his request, to show the other party what property he was receiving, in which list (not signed) the two disputed machines were enumerated. *id.*
34. The court also excluded parol evidence of acts of the parties subsequent to the dissolution, offered with a view to show that the two machines belonged by the agreement for dissolution, to the other party.
35. Where an act is expressly prohibited by a statute, all contracts growing out of its performance are void. *Bell v. Quin*, 146
36. So a promissory note given by one of two parties to the other, for the latter's share of the profits received by the former in a transaction forbidden by law, cannot be recovered by the payee or his voluntary assignee. *id.*
37. The charter of a municipal corporation enacted that no member of the common council, during his official term, should be interested in any contract, the expenses or consideration whereof was to be paid under any ordinance of the common council. A member of the board was interested with the defendant, in a contract for supplying the corporation with coal, and received the defendant's note for half the profits of the contract. *Held*, that his assignee could not recover the note against the defendant. *id.*
38. A party cannot enforce an agreement made by him with an attorney to give him a part of a debt as his compensation for collecting it. *Held* accordingly in an action against the attorney, by one who had made a sub agreement with the attorney to collect a demand placed in the plaintiff's hands for collection. *Satterlee v. Frazer*, 141.
39. Where a stipulation was entered into between the parties, agreeing that the defendants should waive a commission which they had obtained, with a stay of proceedings, and that the plaintiff should deduct a certain amount from his claim, for certain items, in respect to which the defendants should give no evidence on the trial; that the stipulation was made to avoid expense and delay, and that it should not bind the plaintiff as to the deduction, if the defendants should further postpone the trial of the cause beyond the first week in March term, 1846, and the cause was tried in the first week of March term, 1846, and *after a new trial awarded*, the defendants again postponed the trial; it was *held*, that the defendants were precluded from attacking the items in question, and that the plaintiff, relying on the stipulation for such preclusion, was bound to make the deduction stipulated. *Oakley v. Aspinwall*, 7.
40. A sale and delivery of property on condition that the title shall not pass to the purchaser until the purchase money is paid, and reserving to the vendor the right to take possession of the property, in case of non-payment, is a valid contract; and until the purchase money is paid, the vendor's title will not be divested. *Herring v. Willard*, 418
41. There is no contract, express or implied, between a public officer and the government, whose agent he is. Nor have public officers any proprietary interest in their offices, or any property in the prospective compensation attached thereto, whether it be in the shape of salary or of fees. *Conner v. City of New York*, 355
- See BANKRUPT, 1, 2.  
BILLS OF EXCHANGE, 1.  
BOND, 5.  
CONTRACT.  
DEBT, 1 to 5.  
LANDLORD AND TENANT, 1 to 4.  
SALE, 1, 14 to 17, 23 to 25, 28, 31.
- ### APPEALS.
1. Although the appellate court will not weigh the evidence below so as to reverse if it merely preponderate against the judgment; a material defect of

- proof is fatal to the judgment below. *Carter v. Dallimore*, 222
2. On an appeal from a justice's court, it is not proof of the non-residence of the respondent, to show that she could not be found at her place of residence, and it could not be ascertained where she was staying. *Duffy v. Morgan*, 631
  3. An appellant from a justice's court, must in his affidavit, point out specifically, on what point or ground, he alleges the judgment to be erroneous. *Williams v. Cunningham*, 632
  4. The code of procedure regulating appeals from the marine court, in effect requires the appellant to state the substance of the proceedings below, where the alleged error consists of those; and the substance of the testimony when the latter bears upon the question sought to be reviewed. Where the whole reliance of the appellant is upon an error which cannot be remedied or affected by the testimony, it is not necessary in his affidavit to set forth the evidence. *Partridge v. Thayer*, 227
  5. On an appeal from a justice's court, the court below must make a return of all the testimony and proceedings, where a return is ordered. It is not sufficient to make a return as to the particulars in which the affidavits are conflicting. *McCafferty v. Kelly*, 637
  6. On an appeal from a justice's court, the judgment will be reversed by default, if the respondent do not appear to argue the appeal. *Whitney v. Bayard*, 634

See PRACTICE, Appeals.

#### ASSESSMENTS.

See MUNICIPAL CORPORATION.

#### ASSETS.

See AGREEMENT, 31

#### ASSIGNMENT.

1. Voluntary assignees of a defendant in an execution, who become such after

a levy, are not *strangers* within the meaning of the rule which requires an officer justifying against a stranger, to show a judgment as well as an execution. *Heath v. Westervelt*, 110

2. It is sufficient in an action by such assignees against a sheriff, for the latter to produce his execution, and the former cannot impair his right to retain the goods levied, by attacking the judgment. *id.*
3. An assignment of a party's "right and title to certain insurance money my due, and now in the hands of," &c, will pass the right of such party to the money due upon the insurance, although it has not been paid to the person mentioned as having received it. *Sandford v. Conant*, 143

#### ASSISTANT JUSTICE'S COURT.

1. The statute permitted a non-resident plaintiff to sue in a justice's court, by a short summons, having not less than two, nor more than four days to run. He could also sue by the ordinary summons, having not less than six nor more than twelve days to run. Such a plaintiff sued by a summons returnable five days from its date. *Held*, that the justice had no jurisdiction to proceed in the suit. *King v. Dowdall*, 131
2. Where Sunday is an intervening day, it is counted in computing statute time. *id.*
3. The summons in the marine and justice's courts, is not in its form, governed by the provisions of the code of procedure. *Williams v. Price*, 229
4. The pleadings in those courts may be oral, and therefore the provision of the code of procedure requiring pleadings to be verified, does not apply to those courts. *id.*
5. An assistant justice has jurisdiction under the act of 1813, where the plaintiff resides in his district. *Murphy v. Moonéy*, 288
6. Where one defendant resides in the city and the other is a non-resident, they may be sued by a long summons; and it is no objection to the suit that

- the summons is served on the non-resident only. *id.*
7. An assistant justice elected under the act of 1848, has no jurisdiction, where the defendant and one of the plaintiffs reside in the city, and neither of the parties to the suit reside in a ward within the justice's district. *Cornell v. Smith*, 290
8. Appearing and pleading without objection, do not waive the defect nor confer jurisdiction; the statute being peremptory that the justice shall dismiss the cause. *id.*
9. Sections 57 and 61 in the code of procedure of 1848, do not extend to the effect and operation of pleadings as prescribed in title six; but only to their form and manner. *id.*
10. Hence an objection that a justice's court has not jurisdiction of the person, is not waived by an answer omitting to raise it. *id.*
11. A judgment is an express contract of record; therefore, assistant justices and justices of the peace, have jurisdiction of suits upon judgments. They are actions arising on contract. *McGuire v. Gallagher*, 402
12. A justice's judgment, recovered before the code of procedure took effect, is not within the provision of the code prohibiting suits upon such judgments within two years after their rendition. *id.*
13. *Semble*, an assistant justice's court, is a court of a justice of the peace, within the meaning of the section of the code which regulates actions on judgments. *id.*
14. The affidavit that the justice before whom a suit is pending, is a material and necessary witness for the defendant; must state facts and circumstances, clearly showing that the justice's testimony is indispensable. *Murtha v. Walters*, 517
15. The opinion of the party, with facts that show the justice might be a material witness, but which do not show him to be a necessary witness, are not sufficient to require him to enter a discontinuance. *id.*
16. In an assistant justice's court, the plaintiff must prove his demand although the defendant interposes no defence. The default does not admit the plaintiff's claim. *Swift v. Falconer*, 640
- See APPEALS, 1.  
MARINE COURT, 5, 7.
- ASSUMPSIT.
- See AGREEMENT.
- ATTACHMENT.
- See FOREIGN ATTACHMENT.  
PRACTICE, *Attachment*.  
SHIPS AND VESSELS.
- ATTORNEY AND COUNSELLOR.
1. A party cannot enforce an agreement made by him with an attorney to give him a part of a debt as his compensation for collecting it. *Held* accordingly in an action against the attorney, by one who had made a sub-agreement with the attorney to collect a demand placed in the plaintiff's hands for collection. *Satterlee v. Frazer*, 141
2. An actual demand must be proved, in order to maintain a suit against an attorney at law, for money collected by him. *id.*
- B**
- BAILMENT.
- See INSURANCE, 10, 11.
- BANKRUPT.
1. Under the bankrupt act of 1841, a friend of a person applying for his discharge as bankrupt, may buy the debt of an opposing creditor, so as to remove such opposition; provided the bankrupt himself is neither a party, nor privy to the arrangement, and his effects are not to be made liable for the purchase. *Bell v. Leggett's Executors*, 450

2. Accordingly, where a bankrupt debtor applied for his discharge under the act, which discharge was opposed, and thereupon the father-in-law of the petitioner, without his knowledge or connivance, arranged with the opposing creditors to give them his own notes, in satisfaction of their claims, and to take an assignment of their judgments against the bankrupt, as soon as the bankrupt should receive his discharge; and, in pursuance of that arrangement, the opposing creditors withdrew their opposition, and the bankrupt obtained his discharge; *Held*, that such notes were valid, and upon a sufficient consideration, and that an action lay thereon. *id.*
  
3. A discharge in bankruptcy does not extinguish the bankrupt's debts. It exonerates from them, his person and his future acquisitions, but it does not impair their obligation in respect of sureties. *Bowery Savings Bank v. Clinton*, 113
  
4. Where land was purchased in the name of A. one of two partners, not intended or used for the purposes of the partnership; it was held, that T. the other partner, who survived A., took no estate or interest in it as survivor, and no interest in the same passed to his assignee in bankruptcy. *Cox v. McBurney*, 561

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

#### I. *What is a bill or note, consideration, and when valid.*

1. An order drawn at the foot of a bill rendered for services done, expressing a sum certain as due by the debtor in such bill, on a third person, requesting him to pay the bill, and charge it to such debtor, is a *bill of exchange*, which, by the statute, must be accepted in writing. *Hoyt v. Lynch*, 328
  
2. Where an act is expressly prohibited by a statute, all contracts growing out of its performance are void. *Bell v. Quin*, 146
  
3. So a promissory note given by one of two parties to the other, for the latter's share of the profits received by the former in a transaction forbidden by

law, cannot be recovered by the payee or his voluntary assignee. *id.*

4. The charter of a municipal corporation enacted that no member of the common counsel, during his official term, should be interested in any contract, the expenses or consideration whereof was to be paid under any ordinance of the common council. A member of the board was interested with the defendant, in a contract for supplying the corporation with coal, and received the defendant's note for half the profits of the contract. *Held*, that his assignee could not recover the note against the defendant. *id.*
  
5. A promissory note, given to a mutual insurance company as a subscription or premium note, in advance, for the security of dealers, as provided by its charter, is to be regarded as a valid promissory note, liable to be used to pay the losses of the company. *Aspinwall v. Meyer*, 180
  
6. A note payable to a fictitious person, is recoverable as payable to bearer, under the statute, on proof that it was negotiated by the makers. *Stevens v. Strang*, 138
  
7. Evidence stated, which was held sufficient to entitle the holder to recover on such a note. *id.*
  
8. Where a negotiable note is lent by the maker to the payee, or given for the latter's accommodation, without restriction as to the mode of using it, it is valid in the hands of any person to whom it has been transferred for value before maturity, although such value consist in its application to the discharge of a precedent debt due from the payee to such holder. *Montross v. Clark*, 115
  
9. An accommodation bill or note, when negotiated to a third party, imports a consideration as between him and the prior parties. *id.*
  
10. Bills drawn and accepted in respect of consignments of property, are in no sense accommodation bills, though the consignments made are insufficient to meet them. *Mottram v. Mills*, 189



**II. Indorsement; Indorsee's right to recover.**

11. The possession of an usurious note by the indorsee, is presumptive evidence that he received it before it became due, for a valuable consideration, without notice of the usury. *Smedberg v. Simpson*, 85

12. Where a new security is given to such a *bona fide* holder of an usurious note, by one of the parties thereto, after it became due; it was *held* to be valid, notwithstanding the holder of the usurious note was apprised of the usury therein, after he became its holder, and before the new security was given. *id.*

13. On a sale on a credit, to be secured by notes as collateral, not yet due, the receipt of the collaterals five days after the delivery of the goods, makes the seller a *bona fide* holder of the notes for a valuable consideration, so as to protect him against any defence which the maker of the notes had against the buyer of the goods. *Fenby v. Pritchard*, 151

14. This was *held*, although at the time of the sale, the notes in question were not specified or described, and were not in fact then in the possession of the buyer. *id.*

15. A subscription note given to a mutual insurance company, may be transferred by the president of the company alone, in payment of a loss, in the usual way and according to the common practice of the company, without his being authorized to do so by a previous resolution of the board of trustees. *Aspinwall v. Meyer*, 180

16. It was the design of the statute "to prevent the insolvency of monied corporations" to guard against *collusive* transfers of the effects of such corporations. It was not meant to interfere with honest transfers, made in order to pay their just debts. *id.*

17. A person taking from the officers of an insurance company, the note of a third person, in payment of a loss sustained by him, will be *held* to be a *bona fide* purchaser thereof for a valuable consideration and without notice, under the provision of the revised statutes prohibiting certain trans-

fers of corporate effects except upon a previous resolution of the board of directors. *id.*

18. And the maker of such note, in a suit brought thereon by the holder, cannot be permitted to allege that the plaintiff did not pay value for it, or that the trustees of the company did not authorize its officers to transfer the same; unless he can show that he was defrauded, or lost some defence he might have had against the payees, had they retained it. *id.*

19. It is not enough for the maker of a note, when sued thereon, to say that it was transferred to the plaintiff without a valuable consideration; but, to defeat a recovery upon it, he must show that it was transferred in fraud, or to the prejudice of his rights. *Per VANDERPOEL, J.* *id.*

20. It is no defence to an action on a promissory note, that the *property* of the note is in a third person, and not in the plaintiff. Unless the possession of the note by the plaintiff is *male fide*, and may work some prejudice to the defendant, the latter is not entitled to be heard on the subject. *Per VANDERPOEL, J.* *id.*

*See ante*, 8 to 10; *and post*, 42.

**III. Protest and notice of non-payment; and promise to pay, where insufficient.**

21. Where a notary certifies that he attended at the office or place to which a bill of exchange was addressed, for the purpose of demanding payment, and found the office closed, and no person there to give an answer respecting the bill; (it not appearing to have been a bank or banker's office;) it was *held* to be a sufficient presentment of the bill to charge the indorser. *De Wolf v. Murray*, 166.

22. The certificate imports a presentment during the proper hours of business. *id.*

23. A statement, made up by the indorsee, charging the indorser in terms with the "protested exchange," describing it by the drawer's name, the acceptor's name, and the amount, and adding to it expenses of protest, interest and damages, was submitted to



the jury as sufficient notice of the dishonor of the bill, if the indorser were thereby distinctly informed that it had been dishonored, and that payment was expected of him as indorser. *id.*

24. Where notice of dishonor is given too late, the indorser will be bound by a subsequent promise to pay the bill, if made with a knowledge that the notice was not in time. *id.*

25. Where the notary, to whom a bill is intrusted for presentment, on protesting the bill, makes diligent inquiry to ascertain the residence of the drawer, and sends notice to him according to the information thereby obtained, it will be sufficient to charge the drawer, although it appear that he did not reside at the place to which the notice was sent, and in fact resided in the place where the bill was protested. *Carroll v. Upton*, 171

26. Thus, where a bill was drawn at Washington, on a house in New Orleans, and the notary, (as he testified,) on its acceptance being refused in N. O., made diligent inquiry as to the drawer's residence, learned that his reputed residence was at W., and to the best of the notary's knowledge and belief, such was his residence, and thereupon notice was sent to the drawer at W.; it was *held*, that sufficient diligence had been used to charge the drawer; although the testimony on his part proved that he was, and long had been, a resident of N. O., and a counsellor at law there, and was temporarily at W. when the bill was drawn; and it was also proved, that the same notary had known him several years, and three months before, had entered of record an official act as notary, in which the drawer was described as residing in N. O. *id.*

27. The law of the place where a bill is drawn, governs as to the mode and place of the notice of non-acceptance and of non-payment to be given to charge the drawer; and a different usage prevailing at the place where the drawee resides or the bill is presentable, will not be admitted to control the drawer's liability. *id.*

28. A notary charged with giving notice to an indorser of the non-payment of a bill of exchange, must make reason-

able efforts to ascertain his residence if it do not appear on the face of the bill; and it is sufficient if he give the notice in good faith according to the information thus obtained. *Rawdon v. Redfield*, 178

29. If he inquire of persons who are likely to know his residence from their connection with the transaction, and are not interested to mislead; it will be a reasonable degree of diligence. *id.*

30. So where the indorser of a bill, residing at its date in Troy, before its maturity removed to and commenced business in New York, but his name was not in the directory, and a notary protesting the bill in New York, inquired of the acceptor and holder, and being informed by them that the indorser lived in Troy, sent a notice to him by mail at that place, it was held sufficient to charge the indorser. *id.*

#### IV. Who is primarily liable, and discharge of liability.

31. As between the drawer and acceptor of bills of exchange, the presumption of law that the acceptor is primarily liable for their payment, is not overthrown by evidence that they were accepted in respect of consignments of property; it not being shown that the proceeds were insufficient ultimately to meet the bills. *Mottram v. Mills*, 189

32. Such bills are not in any sense accommodation paper; and the drawer stands in the place of a surety for the acceptor. *id.*

33. Where the holders of such bills, over due, agreed with the acceptors, that if they would transfer to a trustee all the consigned property, the holders would not hold the acceptors liable upon such bills beyond a specified sum, less than the entire amount, and the acceptors transferred the property accordingly; it was *held*, that the drawer was thereby discharged. *id.*

34. In general, the holder's giving time to the acceptor or discharging him, will be a discharge to the drawer. *id.*

**V. When drawee or acceptor may recover back money paid on a forged signature or indorsement.**

35. Where a draft, after having been protested for non-payment, is paid to the agent of the holder, by a third person, for the honor of the drawer, without his having seen the draft, but upon the representation of such agent that he has a genuine draft, and the draft afterwards turns out to be a forgery; the person paying it *supra protest*, may, after having given immediate notice of the forgery, recover back the amount paid by him, in an action against the agent, brought before such agent has paid over the money to his principal, and before his situation in respect to his principal has been in any manner changed. *Goddard v. Merchants' Bank*, 247

See *Agreement*, 12.

36. What will be considered due diligence, on the part of a person paying a forged draft, *supra protest*, in giving notice of the forgery. *id.*
37. An agent's merely passing money in account, giving credit, or making a rest, is not equivalent to paying the money over to his principal. *id.*
38. Where the name of an indorser is forged, the acceptor who pays in ignorance of the forgery, may recover back the money from an innocent holder, on the ground that he is not presumed to know the signature of every indorser. But where the name of the drawer is forged, the acceptor who pays the bill will not, as a general rule, be allowed to dispute the genuineness of the drawer's signature. *Per VANDERPOEL, J.* *id.*
39. The acceptor is presumed to know the signature of the drawer, when he accepts, as he is supposed to be in correspondence with him. *Per VANDERPOEL, J.* *id.*
40. Where a draft on a bank was presented for payment by a remote indorsee to whom it was paid, both parties being ignorant of the fact that the first indorsee to whom it was specially indorsed, had never indorsed the draft, but that a fictitious signature resembling his was placed on the draft; it

was held, that on discovering the fraud the bank could recover the amount from the party by whom it was paid. *Merchants' Bank v. McIntyre*, 431

41. Where an agent collects a negotiable draft as indorsee, without disclosing his agency to the drawer, he will be liable to refund the money to the drawer, on its appearing that it was paid on a fictitious indorsement, although the agent has, in the meantime, remitted the proceeds to his principal. *id.*

**VI. Recovery by principal on wrongful pledge by agent.**

42. Where an agent, entrusted with a negotiable note for the purpose of procuring it to be discounted, pledged it with a stranger for money loaned to him for his own use, at usurious interest; *Held*, that the transaction being illegal, for usury, the lender could not retain the note against the true owner on the ground that he had received the same in *good faith*, in the usual course of trade. *Held* also, that the disposal, of the note by the agent, was tortious. *Keutgen v. Parks*, 60
43. An agent on receiving sundry notes to procure them to be discounted, furnished his post dated checks to his principal, intending to meet them with the proceeds of the notes when discounted. Before the date of the checks arrived, he pledged the notes for his own use; and the checks were not paid. He subsequently paid the principal, a small sum, on account. In an action by the principal against the pledgee, for one of the notes; *held*, that the agent, on tortiously disposing of the notes, extinguished any lien he may have had for his checks, and that no lien therefore passed to the pledgee; and that the pledgee had no lien upon the note for the payment made by the agent. *id.*
44. Where a party who received a note, on a tortious misappropriation by an agent, but without notice of the owner's rights, sold it, and received the proceeds; and the owner subsequently demanded the note of him without effect; it was held to be sufficient evidence of a conversion. *id.*

**BOND.**

1. In a suit upon an administrator's bond, the sureties will not be permitted to deny that the surrogate taking the bond and issuing the letters of administration, had jurisdiction of the case. *The People v. Fulconer*, 81
2. It is not necessary in the declaration to set forth the service of the various processes, and the minute and formal proceedings, preliminary to the making of each order or decree by the surrogate. *id.*
3. A count stating the issuing of the letters, the execution of the bond, that the administrators became possessed of assets, that they were required to account by an order of the surrogate, and did account before him, that he decreed a balance in their hands, and ordered it to be paid over to the distributees in specified sums, that the administrators neglected to pay and to comply with the orders whereby the bond was forfeited, and that the surrogate by an order directed it to be prosecuted; was held sufficient on general demurrer. *id.*
4. It was also held that the count need not aver an application by the distributee to the surrogate to have an order made for prosecuting the bond. *id.*
5. On the bond of J. to the plaintiffs, bearing interest at 6 per cent, C. indorsed a covenant, binding himself to them for "an additional one per centum per annum interest, making in all seven per centum per annum on the principal sum secured" by the bond, until the principal should be paid, the interest to be paid at the time and in the manner mentioned in the bond. *Held*, that C. was not bound to pay seven per cent interest, nor more than one per cent on the amount of the bond. That he was liable to pay one per cent, until the bond was paid off. *Bowery Savings Bank v. Clinton*, 113
6. The representatives of a surety in a joint bond, not liable at law for the debt by reason of the survivorship of the principal obligor, cannot be compelled in equity to pay the obligation. *Carpenter v. Provost*, 537
7. The remedy in equity against a de-

ceased joint debtor, is limited to those cases in which he had a benefit from the consideration upon which the obligation arose. *id.*

**BOUNDARIES.**

See DEED, 3 to 5.

**BROKER.**

See PRINCIPAL AND AGENT, 9.

**C**

**CODE OF PROCEDURE.**

See APPEALS, 3 to 6  
PRACTICE, *passim*.

**COMMISSION.**

See PRINCIPAL AND AGENT, 9.  
PRACTICE, *Commission*.

**COMMON CARRIER.**

See INSURANCE, 10, 11.

**COMPROMISE.**

1. To sustain a compromise, made between litigant parties, it is not necessary that each should know all the facts bearing upon the extent of his claim; provided the sacrifice made by him in the compromise, is not proved by him to have been greater than he would have made for the sake of a settlement, if such facts had been fully known to him. *Currie v. Steele*, 542
2. The assets of a decedent at the time of his death, were in the hands of one who claimed as sole legatee, and so continued. The wife of the deceased, (whose relation as wife was contested,) opposed the probate of his will, and succeeded before the surrogate and on two appeals. Pending a third appeal, she compromised and settled the controversy, by receiving all her costs and charges, and a sum in gross, less by about one-fourth than her share of the estate. The amount of the estate was in fact, about one-fourth larger than she was aware of when she settled. In

a suit by her to set aside the compromise, *Held*, 1st. That it was not to be treated as one made between trustee and beneficiary, or between parties standing in a confidential relation to each other. 2nd. That she was not entitled to relief on any ground, it being quite apparent that she would have settled in the same manner if she had known the amount of the estate. *id.*

3. Where a gift in the nature of one *mortis causa*, is given upon a condition or understanding that it is all the donee shall receive from the donor's estate; on the latter's overturning the cotemporary disposal of the estate, and coming in to share it, in violation of such understanding, she will be required to account for the amount of such donation. *id.*

#### CONSIDERATION.

See AGREEMENT, 13 to 16, 19, 20, 35 to 38.

BILLS OF EXCHANGE, 5, 8 to 12, 24 42.

#### CONSTITUTIONAL LAW.

1. The legislature has no authority to grant private property for private uses, making compensation to the owner, unless by his consent. *Embury v. Conner*, 98
2. This is prohibited, as well by the spirit of the provision in the constitution that private property shall not be taken for public use, without just compensation, as by the constitutional provision, that no person shall be deprived of life, liberty, or property, without due process of law. *id.*
3. The provision in the act relative to the city of New York, allowing the corporation on opening or widening a street, which improvement takes a part of an entire lot of ground; in the discretion of the commissioners to include in their estimate and assessment the whole of such lot, awarding damages to the owner, and thereupon the title of the owner to be divested in the portion of the lot not required for the street, and the same to become vested in the corporation; is uncon-

stitutional and void, as to such residue not required for the street. *id.*

(See *post*, *Ejectment*.)

4. The act of December 10, 1847, in relation to the fees of certain officers in the city of New York, is neither a private nor a local act, within the meaning of the 16th section of the third article of the constitution, which provides that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. *Conner v. The City of New York*, 355
5. An officer may be local, in the sense and for the purposes of that provision, and yet a statute respecting the duties and fees of the office may be public and general. *id.*
6. When an office is created by the constitution, and the terms and salary thereof are defined, the people, in their sovereign capacity, may, by a new constitution, terminate both, without regard to the rights, the interests, or the expectations of the incumbent. *id.*
7. An office created by law may be repealed by law, without regard to the term or future salary of the officer entrusted with its exercise. *id.*
8. Officers created by the constitution, the tenure and compensation being fixed by a statute, are equally within the legislative control, as to such tenure and compensation, except that the office cannot be virtually abolished by a colorable reduction of the compensation, or by taking it away altogether. *id.*
9. There is no contract, express or implied, between a public officer and the government, whose agent he is. Nor have public officers any proprietary interest in their offices, or any property in the prospective compensation attached thereto, whether it be in the shape of salary or of fees. *id.*
10. A public officer is an agent, elected or appointed to perform certain political duties in the administration of the government. The legislative power which prescribes his duties and provides a compensation, may alter the duties at pleasure. It may increase them without enhancing the compensation; and, in like manner, it may

diminish the compensation without lessening the duties. *id.*

11. If the officer receives fees, the legislature may abolish some, reduce others, or take away all, and compensate him by a salary. His right to the emoluments of the office is held subject to all these modifications. *id.*

12. And the legislature, in substituting a salary for fees, may continue the fees, and direct them to be paid by the officer into the public treasury. *id.*

13. An act requiring the fees of the office to be paid into the public treasury, is not unconstitutional on the ground that it imposes a *tax*, without specifying the object to which the tax shall be applied. *id.*

14. The duty of pronouncing a statute unconstitutional, is always one of great delicacy; and courts should not exercise that grave function, except where the point is entirely clear. Per SANDFORD, J. *id.*

15. The courts of common law in the several states have jurisdiction to determine questions of salvage, in cases which, in other respects, are within the scope of their established jurisdiction. *Cashmere v. De Wolf*, 379

16. The jurisdiction of the United States courts in admiralty over questions of salvage, is to that extent concurrent, and not exclusive. *id.*

17. A state court having law and equity powers, may entertain a suit to redeem property claimed to be held for a salvage lien, to enforce which salvage no suit is pending in admiralty; and may restrain the removal of the property by injunction, appoint a receiver for its preservation and for its sale, where perishable, and ascertain the salvage liens and decree payment to the parties entitled. *id.*

### CONTEMPT.

See PRACTICE, Attachment.

### CONTRACT.

A judgment is an express contract of record; therefore assistant justices of

the peace, have jurisdiction of suits upon judgments. They are actions arising on contract. *McGuire v. Gallagher*, 402

See AGREEMENT.

BANKRUPT, 1, 2.

DEBT, 2 to 5.

PARTNERSHIP, 1, 2.

### CONTRIBUTION.

See AGREEMENT, 9, 10.

### CONVERSION.

See TROVER, 1 to 3.

### CORPORATION.

1. Where the charter of a corporation, after providing for a subscription to the capital stock on a public notice, authorized the directors, if the whole were not then taken, from time to time to cause the books for the subscriptions of stock to be opened until a sufficient sum was subscribed; the further subscriptions so authorized, may be made without any public notice of opening the books; and the power to receive the same may be delegated to officers or agents of the corporation. *Lohman v. N. Y. & Erie R. R. Co.*, 39

2. The object of a subscription, in filling the stock of a corporation, is to furnish evidence of the subscriber's liability to pay up his shares, and to identify the persons who have become shareholders. *id.*

3. No particular form of subscription is necessary; and when the shares are paid up at the time of their being first taken, the stock certificate issued, and the party's receipt for the shares, constitute a sufficient subscription. *id.*

4. A corporation having power to issue further capital stock, may issue the same in exchange for an equal amount of its indebtedness. *id.*

5. Where there was an express authority from the directors to the principal officers of a corporation, to issue stock in exchange for three distinct classes of indebtedness, and those officers for

a considerable period, had been in the habit of thus issuing stock, in exchange for those, and for a fourth class not embraced in the express authority; and their acts had never been disclaimed or questioned by the directors, or the corporation; it was *held*, that their issue of stock in exchange for such fourth class of indebtedness, was valid and binding upon the corporation, and equally binding upon the creditor who accepted such stock. *id.*

6. One who exchanges his debt against a corporation, for capital stock issued by its principal officers, without inquiring as to their authority, is not at liberty to annul the contract, because their authority was not express, but was a full implied authority derived from the course of business, and from similar acts affirmed or acquiesced in. *id.*
7. Where the stock of a company was usually transferred on two distinct books, to the stock transferred on one of which share brokers attached a greater value than to that on the other; and a creditor agreed to exchange his debt for stock; on the officers stating that such stock could be transferred on the former; and after completing such exchange, the officers refused to allow a transfer of it to be entered on such book; it was *held*, the creditor could not for that cause rescind the exchange, but that his remedy was in an action for damages. *id.*
8. A promissory note, given to a mutual insurance company as a subscription or premium note, in advance, for the security of dealers, as provided by its charter, is to be regarded as a valid promissory note, liable to be used to pay the losses of the company. *Aspinwall v. Meyer*, 180.
9. Such a note may be transferred by the president of the company alone, in payment of a loss, in the usual way and according to the common practice of the company, without his being authorized to do so by a previous resolution of the board of trustees. *id.*
10. It was the design of the statute, to prevent the insolvency of monied corporations to guard against collusive transfers of the effects of such corporations. It was not meant to interfere

with honest transfers, made in order to pay their just debts. *id.*

11. A person taking from the officers of an insurance company, the note of a third person, in payment of a loss sustained by him, will be held to be a bona fide purchaser thereof for a valuable consideration and without notice, under the provision of the revised statutes prohibiting certain transfers of corporate effects except upon a previous resolution of the board of directors. *id.*
12. And the maker of such note, in a suit brought thereon by the holder, cannot be permitted to allege that the plaintiff did not pay value for it, or that the trustees of the company did not authorize its officers to transfer the same, unless he can show that he was defrauded, or lost some defence he might have had against the payees, had they retained it. *id.*

See MUNICIPAL CORPORATION.

### COSTS.

1. Where a plaintiff, claiming over four hundred dollars, on the proof in the cause appears to be entitled to less than two hundred dollars, and by reason of set-offs recovers less than fifty dollars, he is not entitled to the costs of the suit. *Spring Valley Shot and Lead Co. v. Jackson*, 622.
2. The words "*claim established at the trial*," in the statute regulating costs, mean a claim so proved and established that it will entitle the plaintiff to judgment, unless it be reduced by a set-off. Establishing the claim presumptively, will not suffice, where it is defeated by counter-proof. *id.*
3. A plaintiff residing out of the city of New York, though within this state, must give security for costs, notwithstanding the court may issue executions against property to any county in the state. *Gardner v. Kelly*, 632.
4. This rule applied to a certiorari brought to reverse a justice's judgment. *id.*
5. The code of procedure does not repeal

the revised statutes relative to security for costs. *id.*

6. A defendant who has been let in to defend, after a default and judgment, the latter standing as security, may require security for costs from a non-resident plaintiff. *id.*

7. A bond as security for costs, conditioned that the plaintiffs shall pay to the defendants the costs which he might recover in the suit, is a sufficient compliance with the statute which requires a bond conditioned to pay, on demand, all costs that may be awarded to the defendant in such suit. *Smith v. Norval*, 653.

See PRACTICE, Costs.

### COUNSELLORS.

See ATTORNEYS AND COUNSELLORS.

### COUNTY CHARGES.

See SUPERVISORS.

### COVENANT.

On the bond of J. to the plaintiffs, bearing interest at 6 per cent, C. indorsed a covenant, binding himself to them for "an additional one per centum per annum interest, making in all seven per centum per annum on the principal sum secured" by the bond, until the interest should be paid, the interest to be paid at the time and in the manner mentioned in the bond. *Held*, that C. was not bound to pay seven per cent interest, nor more than one per cent on the amount of the bond. That he was liable to pay one per cent, until the bond was paid off. *Bowery Savings Bank v. Clinton*, 113.

See DEED, 10.

### CREDITORS SUIT.

1. A judgment creditor whose execution was issued and returned unsatisfied before the code of procedure, may, without first obtaining leave of the court in which the judgment was re-

covered, proceed against his debtor by a complaint in the nature of a creditor's bill. *Quick v. Keeler*, 231

2. The rules of court requiring certain allegations to be contained in a creditor's bill, are superseded by the code which declares what shall be stated in the complaint. If the plaintiff comply therewith, and set forth the matters which by the revised statutes were a pre requisite to the filing of the bill, it is sufficient. *id.*

3. An assignment of personal effects to trustees, in trust for the separate use of the wife of the grantor, which effects continue in his possession after the assignment, is fraudulent and void against a subsequent creditor, whose debt arose during the continuance of such possession. *Fiedler v. Day*, 594

4. The trustees under such transfer, took the grantor's note for the effects so left in his hands, and on the grantor's afterwards failing, he assigned his property for the benefit of his creditors, giving a preference to the note. *Held*, That this assignment was fraudulent as against creditors. *id.*

5. An assignment for creditors, fraudulent in respect of a principal preferred debt, is void *in toto*, although another preferred debt, and the unpreferred debts provided for, be all due in good faith. *id.*

6. The plaintiff in a judgment, who has filed a creditor's bill, and obtained a receiver of the defendant's property, will not be permitted to levy an alias execution on personal property covered by such receivership. *Gouverneur v. Warner*, 624.

7. A levy made thereon, will be set aside on the defendant's application, unless the plaintiff will waive his receivership and dismiss his creditor's suit. *id.*

8. An action in the nature of the former creditor's suit, may be maintained, where an execution was issued and returned unsatisfied before July 1, 1848, when the code of procedure took effect. *Dunham v. Nicholson*, 636

9. Such a suit is not an action on the judgment, within the meaning of the prohibition in the code. *id.*



10. A frivolous answer in such a suit, stricken out on motion, and an order for judgment made, with a direction for the examination of the defendant touching his property. *id.*

11. An execution may be returned in less than sixty days, and whenever returned unsatisfied, the creditor may proceed under section 292 of the code, without regard to the period it was in the sheriff's hands. *Engle v. Bonneau*, 679.

12. If the debtor show any fraud or collusion in omitting to levy on property, the court will take care the fraud is not effectuated. *id.*

13. The execution must be actually returned by the sheriff, before the supplementary proceeding can be commenced. *id.*

14. No costs to a defendant on this proceeding, on his procuring it to be dismissed, without an examination. *id.*

See PRACTICE, Attachment.

#### CUSTOM.

See USAGE.

### D

#### DAMAGES.

1. On the default of the vendor in a contract to sell and deliver goods at a specified time, for a price then payable, the measure of damages in an action by the vendee, is the difference between the contract price, and the market value at that time, with interest on such difference. *Beale v. Terry*, 127

2. The same rule applies against a guarantor of the vendor's fulfilment of the contract. *id.*

2. In actions of tort, the jury are the proper judges of the weight and effect of the evidence; and the court will not interfere with the damages found by them, unless they appear to be grossly disproportionate to the injury sustained. *Kendall v. Stone*, 269

3. In an action for slander of title, the judge is justifiable in charging the jury

that they may give exemplary damages; and in refusing to charge that they can only give compensatory, as distinguished from exemplary, damages. *id.*

See SALE, 27.

#### DEBT.

1. In an action to recover of a stakeholder money staked with him by the plaintiff, on a wager upon the event of a horse race, the defendant cannot set off the amount of a deposit made by him with the plaintiff, upon another wager of a similar character. *Bevins v. Reed*, 436

2. The statute having declared wagers unlawful, and every contract respecting them void, the sole remedy of a party depositing money upon a wager is by a suit, under the statute, to recover back the money deposited. He cannot recover it without suing for it, by way of a defence or set off in a suit brought against him. *id.*

3. There is no indebtedness, in such a case, from the stakeholder to the depositor. *id.*

4. There is merely a right, on the part of the latter, to sue the former, in accordance with a strict statutory grant of relief where no other remedy exists. *id.*

5. Aside from the language of the statute, giving to a party depositing money upon a wager a remedy by suit against the stakeholder, his right to recover back the amount of his deposit is not a demand which can be set off; it not being a demand arising upon judgment, or upon contract, express or implied. *id.*

See JUDGMENT AND EXECUTION, 1 to 3.

#### DEBTOR AND CREDITOR.

See BANKRUPT, 3.

CREDITOR'S SUIT, 1, 3 to 5, 8, 11.  
PRACTICE, Warrant, &c.

#### DECREE.

See JUDGMENT AND EXECUTION.



## DEED.

1. In ejectment for a piece of land unconstitutionally taken by a municipal corporation under a statute for widening a street, allowing the taking of gores remaining after appropriating the portion required for the street, it appeared that the owners, after the corporation had conveyed the land away, received the compensation awarded by the commissioners in an entire sum, as well for such piece as for the land taken for the street; that the owners had contended before the commissioners for a greater allowance and not that their proceeding was illegal; and that the grantee of the corporation had taken possession, and held it undisturbed for seventeen years; *held*, that the owners were not estopped or barred from recovering the premises in ejectment. *Embury v. Conner*, 98  
(See *post*, *Ejectment*.)
2. The provision of the act that unrecorded deeds shall be void against *bona fide* purchasers, &c., is intended for the protection of purchasers against previous grants of those under whom they derive title. It has no application to a purchaser who derives his title from one claiming in hostility to all of the parties in the unrecorded deed. *id.*
3. Where, in a conveyance of city lots, the premises were described as being bounded by exact measurement of feet and inches, then on two sides by the side of two several streets laid out and opened, and then "southerly by the northerly line or side of T. B.'s lane;" and the deed also described the premises as lot 21 on a map referred to, and as bounded by two other lots on that map, and the map contained those and a large number of city lots, exactly protracted by metes and bounds, excluding the streets and lane; *Held*, that the description limited the grantee to the northerly side of the lane, and did not carry him to the centre thereof. *Jones v. Cowman*, 234
4. In a deed, bounding the grantee by a lane, there was added in the description of the premises, "Together with the use and privilege of the said lane, until the Mayor, Alderman and Commonalty of the city of New York, shall cause streets to be opened running through or adjoining the said piece or parcel of land hereby granted;" *Held*, that the latter words were evidence of an intention on the part of the grantor, to exclude the lane from the principal grant. Per *VANDERPOEL, J.* *id.*
5. In an action of ejectment, the inquiry respecting the plaintiff's title must be confined to the question what was conveyed to him by his immediate grantor, not what ought to have been conveyed to a remote source of the plaintiff's title. *id.*
6. Every trustee of real estate is presumed to take as large an estate as is necessary for the purpose of the trust, and no more. *Norton v. Norton*, 296
7. Where before the revised statutes, a husband conveyed to a trustee his title to his wife's land, in trust to dispose of it for her, and to manage it and collect the rents for her benefit; it was *held*, that the trustee took an estate for the wife's life only, with a power in trust to dispose of the husband's life interest; and the power not having been executed, the trust ceased on the wife's death, leaving the husband surviving. *id.*
8. If the deed had conveyed to the trustee the whole life estate of the husband, the wife's interest being a mere equitable estate for the life of another, on her death it would go to her administrator, and to her husband as entitled to her personal property subject to her debts; and the trust, if outstanding, would thereupon, by the revised statutes, be converted into a legal estate. *id.*
9. The nominal consideration of one dollar, expressed in a deed of executors, is enough to sustain the deed, so as to pass the legal estate. The question whether such conveyance was fraudulent in fact, cannot be raised in the action of ejectment to try the legal title. *Meakings v. Cromwell*, 512  
See *Will*.
10. A grant of a municipal corporation having the right to land on the shore and under the water of a river or harbor, of the land under water from high water mark, to A. in fee, reserving so much of the soil under water as was required for a street, which was to become the exterior line of the filling up of such land, and the same, as well as

the wharves built out therefrom, were to be public streets and wharves; and which grant contained a covenant of the corporation, that A. and his heirs &c., fulfilling their covenants, might have and enjoy the wharfage and all the advantages of the wharves to be erected;—conveys conditionally in respect of the wharf or bulkhead made by the street, an interest, which is real property; and it is not to be considered as a mere covenant. *Boreel v. City of New York*, 552

11. The plaintiff was the grantee of premises occupied by the defendants, at the time of his purchase, under a lease from the grantor. The deed to the plaintiff was subject to a mortgage upon the premises, and was unrecorded. The defendants had attorned to the plaintiff, and paid rent to him. Subsequently the mortgage was foreclosed, but the plaintiff was not made a party to the suit. The premises were sold by a master, on the 7th of April, and bid off by M., under whom the defendants claimed; but M. did not pay the purchase money, until the 5th of May, when he took a deed from the master, and had it recorded. In an action by the plaintiff to recover the rent due on the 1st of May next after the sale; *Held*, that his claim to the rent was unaffected by the foreclosure proceedings, and that his title remained valid until it was divested by the recording of the master's deed. *Strong v. Dollner*, 441

12. *Held also*, that the recording of the master's deed had no relation back to the time of the sale, so as to divest rights of action previously accrued to the plaintiff by virtue of his unrecorded deed. *id.*

13. Although the recording act makes an unrecorded conveyance void as against a subsequent purchaser in good faith, for value, whose deed is recorded first, it does not avoid the former as of a time prior to the execution of the latter. It does not transfer to such subsequent purchaser rights in respect of the property, against third persons, which were vested in the owner holding under the unrecorded deed, prior to the execution of the subsequent conveyance. *id.*

## DEMAND.

See JUDGMENT and EXECUTION.

## DEPOSIT.

See SALE, 1.

## DISCOVERY OF BOOKS, &c.

See PRACTICE, *Discovery*.

## DONATIO MORTIS CAUSA.

Where a gift in the nature of one *mortis causa*, is given upon a condition or understanding that it is all the donee shall receive from the donor's estate; on the latter's overturning the cotemporary disposal of the estate, and coming in to share it, in violation of such understanding, she will be required to account for the amount of such donation. *Currie v. Steele*, 542

## DOWER.

1. An agreement made during coverture, between a husband, his wife, and a trustee of the latter, that in consideration of her enjoying separately and absolutely controlling her separate property, she would relinquish her dower in his lands, is invalid, and cannot be enforced against her in an action for her dower. *Townsend v. Townsend*, 711

2. In a complaint under the code, asking to have dower set off and admeasured, it was held that it might be regarded as a substitute for the former petition for admeasurement, or the former bill in equity; and thus it was no objection that the defendant, who was seized, was not in the actual possession of the lands, or that six months had not elapsed since the death of the husband. *id.*

## DURESS.

See AGREEMENT, 22 to 25.

**E**

**EJECTMENT.**

1. In ejectment for a piece of land taken unconstitutionally by a municipal on a street widening, it appeared that the owners, after the corporation had conveyed the land away, received the compensation awarded by the commissioners in an entire sum, as well for such piece as for the land taken for the street; that the owners had contended before the commissioners for a greater allowance, and not that their preceeding was illegal; and that the grantee of the corporation had taken possession, and held it undisturbed for seventeen years; *held*, that the owners were not estopped or barred from recovering the premises in ejectment. *Embury v. Conner*, (a) 93
2. Under the act for loaning the United States deposit fund, (Laws of 1837, ch. 150,) on the failure of the borrower to pay the annual interest at the time prescribed, the loan commissioners became seised of the lands mortgaged, so that the mortgagor (not having paid the debt and costs after the default and before the sale,) cannot maintain ejectment to obtain possession. *Olmsted v. Elder*, 325
3. The production of the mortgage having no entry upon it of the payment of interest, and the efflux of time, are sufficient to establish presumptively the default in the payment of the annual interest. *id*
4. The loan commissioners having assumed to sell on such a default, and conveyed to a purchaser who entered into possession; it was *held*, that if the sale were irregular, the deed transferred the mortgage to the purchaser, who thus being a mortgagee

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(a) This judgment was reversed by the court of appeals, after the sheets containing the report were printed; on the ground, that it should have been submitted to the jury, on the evidence given and offered, to say whether or not the then owners consented to the taking of the premises in question by the commissioners of estimate and assessment; and that such consent, although it were by parol, would transfer the title to the city of New York, when followed by the confirmation of the supreme court. The other points decided in the superior court, were affirmed.

in possession, could retain the possession until redemption. *id.*

See DOWER, 2.

**ESTATE.**

See HEREDITAMENTS.  
LOAN COMMISSIONERS.

**ESTOPPEL.**

See EJECTMENT, 1.

**EVICITION.**

See LANDLORD and TENANT, 3, 4, 6.

**EVIDENCE.**

1. Evidence which was held sufficient to prove one a secret partner; and burthen of explaining entries tending to establish that fact. *Oakley v. Aspinwall*, 7
2. Where a person who contracted a debt in his own name, had confessed judgment in a joint suit brought against himself and another sued as his partner, upon whom process had not been served, whereupon judgment had been entered against both, under the joint debtor act, and a suit was brought, founded upon such judgment, which was defended by the party who had not been served; it was *held*, that the debtor who confessed the judgment, was on the ground of interest, not a competent witness for the plaintiff.—Per SANDFORD, J., at Nisi Prius. *id.*
3. An account subscribed by the ostensible partner of a commercial house, and dated while the partnership existed, is not competent evidence against one sought to be charged as a secret partner, to show to what the joint business extended; there being no proof except by its date, that such account was in existence during the continuance of the firm.—Per SANDFORD, J., at Nisi Prius. *id.*
4. An agent who has tortionally pledged notes entrusted to him, is a competent witness for his principal in an action brought against the stranger for

- the recovery of the notes *Keutgen v. Parks*, 60
5. The record of the principal's recovery, will not be evidence for the agent in a subsequent suit; nor will he be liable to the principal for the costs, if the suit be unsuccessful. His interest is balanced, and the usury in the loan to him, does not alter the case. *id.*
  6. Where a party who received a note, on a tortious misappropriation by an agent, but without notice of the owner's rights, sold it and received the proceeds; and the owner subsequently demanded the note of him without effect; it was *held* to be sufficient evidence of a conversion. *id.*
  7. A party calling a witness, may satisfy the jury from facts and circumstances stated by the witness himself, that he is mistaken in some of his statements and conclusions, while in others he is correct. *id.*
  8. The terms of a written contract which are free from ambiguity, cannot be varied or impaired by parol evidence, nor by proof of the subsequent acts of the parties. *Lowber v. Le Roy*, 202
  9. Such acts are, in general, not admissible, except in cases of latent ambiguity in the written contract. *id.*
  10. The admission of extrinsic evidence to show the condition of the subjects of the contract, and the circumstances under which it was made, rests on a different principle. *id.*
  11. Where by a written agreement for dissolution of a partnership, which, among other property, owned a steam engine, a rolling mill, and a pipe machine; one of the partners was to take all the *machinery*, and it was clear upon the terms of the writing and the existing circumstances, that this included the steam engine and rolling mill, as well as the pipe machine; the court excluded parol evidence which was offered to prove, that the two former were not included in the *machinery*, but were to belong to another party; and as a part of the parol testimony, excluded a written list of assets, subsequently made by a clerk in the presence of the first named partner, and at his request, to show the other party what property he was receiving, in which list (not signed) the two disputed machines were enumerated. *id.*
  12. The court also excluded parol evidence of acts of the parties subsequent to the dissolution, offered with a view to show that the two machines belonged by the agreement for dissolution, to the other party. *id.*
  13. The declarations or admissions of the wife, are not competent testimony to sustain a suit against husband and wife, for the debt of the wife while sole. *Lay Grae v. Peterson*, 338
  14. Though the cause of action spring from the wife's act or right, her statements respecting it are inadmissible in a suit against the husband or affecting his rights, except where she acts as his agent, and then they are governed by the principles applicable to agents. *id.*
  15. A wife cannot be compelled to appear and be examined as a witness in a suit against her husband. *Erwin v. Smallen*, 340
  16. The code of procedure allowing a party to call the adverse party as a witness, has not affected this principle, which proceeds, not on the ground of interest in the suit, but on the ground of its leading to the interruption of domestic harmony and confidence. *id.*
  17. In order to test the credibility of a witness called to prove the plaintiff's demand, it is competent to show by him that a transfer of the establishment in which the demand arose, made by him to the plaintiff, was a sham and fraudulent sale, and thus that the witness is really interested in the demand in question. *Hoyt v. Lynch*, 328
  18. The evidence is admitted to impeach the witness, not to impeach the plaintiff's title to the demand. *id.*
  19. Where a defendant, on the trial of a cause, called the plaintiff as a witness, under the 349th section of the Code, and in reply to a question put to him by the *court*, the plaintiff testified to new matter, going beyond the point to which he was examined by his adversary: *Held*, that the defendant was entitled to offer himself as a witness for

the purpose of answering the new matter. *Myers v. McCarthy*, 399

20. A party residing out of the state may be examined as a witness, on a commission, at the instance of the adverse party. *Brockway v. Stanton*, 640

21. A party may be examined as a witness at the instance of the adverse party, in all cases, after issue and before the trial, upon an order of a judge; without the existence of any circumstance which would authorize a commission or an examination conditionally under the revised statutes. *Par-tin v. Elliott*, 667

22. Such examination may be had, on five days notice requiring it, without any order of a judge; the party being subpoenaed and paid his fees as a witness. *id.*

23. The issuing of a commission to take the testimony of a witness out of the state, though usually directed, is not a matter of strict right. *Ring v. Mott*, 683

24. Where a commission is likely to produce great injury to the adverse party, terms will be imposed, and in extreme cases it may be wholly refused. *id.*

25. A stockholder in an incorporated company, is not a party to the action, nor a person for whose immediate benefit it is prosecuted, within the meaning of section 399 of the code, and is therefore a competent witness in favor of the corporation. *Washington Bank v Palmer*, 686. *S. P., N. Y. and Erie R. R. Co. v. Cook*, 732

26. A co-defendant, who is primarily liable for the debt claimed, is, under the code, a competent witness for the plaintiff. *Bank of Charleston v. Emeric*, 718

27. Where at the trial, documentary evidence which proves itself, and on which no question can arise in the cause, except such as is apparent on its face, is unadvisedly omitted, and an objection taken thereupon; the court will nevertheless permit the document to be produced upon the argument of the case; and if there be no surprise apparent, or any point in which the defence was prejudiced by the omission at the trial,

the court will regard it as having been produced at the trial. *id.*

28. Where sufficient time has elapsed, *prima facie*, to have obtained the return of a commission, issued with a stay of proceedings, the stay will be vacated on motion of the adverse party; and on the cause being called for trial, the party taking the commission must establish the grounds for a further stay, if there be any, for the return of the commission. *Voss v. Fielden*, 690

29. Where it was averred in a declaration, that the defendants represented a note to be "a good note, and that it would pass in South street," and the proof was that they said "the note was good, and that there were people in South street who would take it." *Held* there was no substantial variance. *Hawkins v. Appleby*, 421

See BOND, 1.

SLANDER OF TITLE, 5, 7, 8.  
USAGE.

## EXECUTION.

See JUDGMENT AND EXECUTION.

## EXECUTORS AND ADMINISTRATORS.

1. Where a testator, by his will, after giving to his wife the rents of certain premises during her life, devised as follows: "after her death, the house and lot, the corner of Amity and Greene streets, to be sold, and the net proceeds equally divided between B. H. O., J. H. O., and their sister C. O., share and share alike;" *Held*, that a power in the executors to sell the premises, after the death of the widow, was to be implied. *Meakings v. Cromwell*, 512

2. *Held also*, that an execution of such power by one of several executors, the others not having qualified, was valid. *id.*

3. Whenever a power is given, in a will, to sell lands, without expressly naming a donee of the power, and the proceeds of the sale are to go to pay debts or legacies, or to be distributed, the power vests in the executors, unless a contrary intent appears. *id.*

4. Such an implication is much strengthened by the circumstance that two of the persons who are the objects of the testator's bounty, and who are beneficially interested in the execution of the power, are named as executors. *id.*
5. An equity of redemption belonging to an intestate, does not pass to his administrator on its being converted into a surplus by foreclosure and sale. *Cox v. McBurney*, 561

See BOND, 1 to 4, 6, 7.  
COMPROMISE, 2.

### EXTRINSIC EVIDENCE.

See EVIDENCE, 8 to 12.

## F

### FACTOR.

See PRINCIPAL AND AGENT, 1, 2.

### FEEs

See OFFICER.

### FOREIGN ATTACHMENT.

1. In a proceeding by way of foreign attachment, for a debt upon which a judgment has been recovered against all the joint debtors, some of whom were not served with process, it is sufficient to describe the debt claimed as being founded on the judgment, without mentioning the original cause of action for which it was recovered; although such cause of action must be proved, to establish the demand against those who were not served. *Oakley v. Aspinwall*, 7
2. Whether the taking out of a foreign attachment, (naming a garnishee,) giving bail therefor, and prosecuting it after service; will make the attaching creditor liable in trespass or trover, for goods in the hands of the garnishee, whom the sheriff has summoned, leaving the goods in his possession; there being no direction by the creditor to

levy on any specified goods? *Quere Clark v. Tucker*, 157

### FRAUD.

See CREDITOR'S SUIT, 3 to 5.  
EVIDENCE, 17, 18.  
PARTNERSHIP, 5 to 7.  
PRACTICE, 131, 132.

### FRAUDS, STATUTE OF.

1. Where a sale of goods is made on an agreement that the price shall be applied to the payment of a precedent debt, such price must be actually applied by a receipt or otherwise, to bring it within the exception in the statute of frauds, founded on payment of all or part of the price. *Clark v. Tucker*, 157
2. In order to constitute an acceptance and receipt of the goods, to take a sale out of the statute, there must be an act of delivery on the part of the seller, as well as an act of acceptance by the buyer. *id.*
3. Where goods in the possession of a factor, were sold by a parol agreement, and a constructive delivery was set up, first by a letter at the time from the buyer's agent to the factor; and second, by a letter a fortnight afterwards, by the seller to the factor; it was *held*, that the sale was void, because the seller did not participate in the act of delivery sought to be inferred from the first letter, and because the buyer did not accept and receive in connection with the second. *Held* also, that the second letter was too late; and that an act of delivery by notice to the factor, must be concurrent, or substantially at the same time that the contract is made. *id.*
4. A contract to sell and deliver cider at a future time, which the seller is to procure from farmers and refine to fit it for market, is a contract for the sale of goods; and if by parol, is within the statute of frauds. *Seymour v. Davis*, 239
5. Where a parol contract was made for the delivery of five hundred barrels of cider, in parcels at future periods, each to be paid for in a note on delivery,

and several parcels were delivered from time to time, and all paid for except the last; in an action for the last, it was *held*,

1. That the delivery and acceptance of each parcel, made a several and distinct contract of sale of such parcel; upon each of which successively, each party had all the actions and remedies incident to a sale. Each shipment must be regarded as a sale by itself of the quantity accepted, independent of the original void agreement.
2. That the shipments and deliveries so made, though in consequence of the void agreement, cannot be regarded as one transaction, so as to entitle the buyer to recoup against the price of the parcel last received, his damages by reason of defects in the previous parcels.
3. The part performance of a void contract for the sale of goods, does not take it out of the statute of frauds, even in respect of the portion performed. Acts of delivery and acceptance under such a contract, establish a new contract of sale, in which more or less of the terms of the void agreement may be expressly or impliedly embodied; but each delivery and acceptance make a distinct contract. *id.*
7. Where a debtor remits money to a third person, with directions to pay it to his creditor, and the latter, upon being informed of it, calls upon the remittee, who then positively promises to pay such money to the creditor, it is a valid promise, and will support an action in favor of the creditor. *Wyman v. Smith*, 331
8. Such a promise is not a promise to pay the debt of a third person, and is not therefore within the statute of frauds. It is a promise to pay money which the defendant had received for the use of the plaintiff, and is consequently binding. *id.*

## G

## GUARANTY.

See FRAUDS, STATUTE OF, 7, 8.

## H

## HABEAS CORPUS.

1. A judge under section 302 of the code, has power to punish as for a contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt, may therefore properly be made returnable before him, at his office. *Matter of Smethurst*, 724
2. Although the code gives the power of punishing disobedience of his orders to the judge, reference must be had to the revised statutes as to the mode in which that power is to be exercised. (2 R. S. 535.) *id.*
3. Under this statute a judge, upon due proof, may, in his discretion, issue an attachment in the first instance, against the party accused, to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court. *id.*
4. It seems, that in the first judicial district, the ordinary practice is, to give notice of motion for an attachment, or obtain an order to show cause. *id.*
5. Whether the affidavits upon which an attachment is issued, are sufficient to warrant its issuing, is a matter that cannot be reviewed on habeas corpus. *id.*

## HEREDITAMENTS.

1. A grant of a municipal corporation, having the right to land on the shore and under the water of a river or harbor, of the land under water from high water mark, to A. in fee, reserving so much of the soil under water as was required for a street, which was to be-



come the exterior line of the filling up of such land, and the same, as well as the wharves built out therefrom were to be public streets and wharves; and which grant contained a covenant of the corporation, that A. and his heirs, &c., fulfilling their covenants, might have and enjoy the wharfage and all the advantages of the wharves to be erected;—conveys conditionally in respect of the wharf or bulkhead made by the street, an interest, which is real property; and it is not to be considered as a mere covenant. *Boreel v. City of New York*, 552

2. Such an interest is an incorporeal hereditament. *id.*
3. Incorporeal hereditaments, are not subject to taxation by the provisions of the revised statutes concerning the assessment and collection of taxes. *id.*
4. They are not *land, real estate or real property*; nor are they *chattels or personal property*; as defined in the tax law. *id.*

#### HUSBAND AND WIFE.

1. Where before the revised statutes, a husband conveyed to his trustee his title to his wife's land, in trust to dispose of it for her, and to manage it and collect the rents for her benefit; it was held, that the trustee took an estate for the wife's life only, with a power in trust to dispose of the husband's life interest; and the power not having been executed, the trust ceased on the wife's death, leaving the husband surviving. *Norton v. Norton*, 296
2. If the deed had conveyed to the trustee the whole life estate of the husband, the wife's interest being a mere equitable estate for the life of another, on her death it would go to her administrator, and to her husband as entitled to her personal property subject to her debts; and the trust, if outstanding, would thereupon, by the revised statutes, be converted into a legal estate. *id.*
3. A promise made by a married woman to pay for goods purchased by her during coverture, is void; and the law will not raise an implied pro-

mise by her from such consideration. Neither will such precedent consideration support an express promise by her to pay the debt, made after her divorce from her husband. *Watkins v. Halstead*, 311

4. A woman, in contemplation of marriage, by deed dated previous to the act for the more effectual protection of the property of married women, conveyed her estate, real and personal, to a trustee, in fee and absolutely, reserving to herself only the entire control of the income for her separate use for life, the direction of the investment and re-investment of the capital by the trustee, the power to dispose of the whole by an instrument in the nature of a will, and the full restoration of the property if she survived her intended husband. And the trust-deed provided, that in case of the decease of the grantor without making any appointment, the trustee should pay over and transfer the trust estate "*to such person or persons as would be her legal representatives by the statute, for the distribution of intestates estates.*" Held, that a complaint by the grantor, subsequent to the marriage, and during the life of her husband, brought for the purpose of having the marriage settlement set aside, and the capital of the estate given to her as she held and owned it previous to the date of the conveyance, could not be sustained, the infant children of the plaintiff having a contingent future estate in the property, which the court could not divest. *Watson v. Bonney*, 405
5. Held also, that if the property had been limited over to the "legal representatives" of the grantor, simply, the husband would, at his wife's death, have taken the property either beneficially, or officially, as her personal representative; but that the addition of the words "by the statute of distributions," changed the devolution totally, and carried it to the next of kin, to the exclusion of the husband. *id.*
6. Held, further, that the rights and interests of the parties, under the trust-deed, were not in any wise affected by the provisions of the act of 1848, "for the more effectual protection of the property of married women."—And that the rule would be the same,



- even upon the assumption that the children of the plaintiff had no rights, under the settlement. *id.*
7. The object of that act was not to enable married women to destroy their marriage settlement, by which their property had already been effectually protected for the benefit of themselves and their children. *id.*
8. The statute does not profess to interfere with existing contracts, and the court cannot give it a retrospective action by intendment. If it had, in terms, been made applicable to executed settlements, and had divested the estates of the trustees, it would have been utterly nugatory and unconstitutional. *id.*
9. An agreement made during coverture, between a husband, his wife, and a trustee of the latter, that in consideration of her enjoying separately and absolutely controlling her separate property, she would relinquish her dower in his lands, is invalid, and cannot be enforced against her in an action for her dower. *Townsend v. Townsend*, 711
10. The declarations or admissions of the wife, are not competent testimony to sustain a suit against husband and wife, for the debt of the wife while sole. *Lay Grae v. Peterson*, 338
11. Though the cause of action spring from the wife's act or right, her statements respecting it are inadmissible in a suit against the husband or affecting his rights, except where she acts as his agent, and then they are governed by the principles applicable to agents. *id.*
12. A wife cannot be compelled to appear and be examined as a witness in a suit against her husband. *Erwin v. Smullen*, 340
13. The code of procedure allowing a party to call the adverse party as a witness has not affected this principle, which proceeds not on the ground of interest in the suit, but on the ground of its leading to the interruption of domestic harmony and confidence. *id.*
14. Under the code, a married woman may sue for a limited divorce, without the intervention of a next friend. *Shore v. Shore*, 715
- See DOWER, 2.
- II
- ILLEGAL CONTRACT.
- See AGREEMENT, 35 to 33.
- INCORPOREAL HEREDITAMENT.
- See HEREDITAMENTS.
- INFANT.
1. An infant is liable for money lent and advanced, which was lent in and about the purchase of necessities for the infant, and which was so applied directly by the lender, and under his directions. *Smith v. Oliphant*, 306
2. The action upon the infant's liability in such a case, may be brought for money lent and advanced. *id.*
- INJUNCTION.
- See PRACTICE, *Injunction*.  
TRADE MARKS.
- INSURANCE.
1. An abandonment of a cargo insured, in order to be effectual, must be warranted by the state of things actually existing when it is made. And if made on information warranting an abandonment, and was not accepted when made; it will not be valid, if it afterwards appear that such information was erroneous, and there was in fact no technical total loss. *Child v. Sun Mutual Ins Co.*, 76
2. So, where a whaling vessel was stranded and lost, and on receiving information of the disaster, the owner of the vessel and cargo gave notice of abandonment to the underwriters; and,

- after subsequent advice of the safety of part of the cargo, gave a further notice of abandonment; but prior to the first notice, nearly the whole cargo had been saved, and had arrived at an intermediate port; and there had been no notice or act on the part of the underwriters accepting the abandonment; it was *held*, that it was not a valid abandonment of the cargo, and that the profit arising from a sale of the saved portion of the cargo, and the investment of the proceeds in coffee, at the intermediate port, belonged to the assured, who were entitled to claim for a partial loss. *id.*
3. Where the expense of repairing a vessel injured by perils of the sea, will exceed a moiety of her value, the owners have a right to abandon her to the underwriters, and to recover for a total loss. *Suarez v. Sun Mutual Ins. Co.* 482
  4. The assured has the right to make full repairs at the port of necessity, if they can be made there; and the expense of such repairs, at that port, furnishes the criterion for determining whether the loss be partial or total. *id.*
  5. The assured is under no obligation to make partial repairs, so as to bring the vessel to a port where she can be completely refitted at less expense. *id.*
  6. The condition of a vessel, at the time of the abandonment, is the test of the right to abandon. *id.*
  7. As the capacity of a vessel to pursue her voyage is the ground of an abandonment, so the act of repairing, which is to divest the right to abandon, must be performed with the intent to make the vessel seaworthy, so that she may prosecute her voyage. *id.*
  8. An abandonment, when effectually made, relates back to the time of the loss. *id.*
  9. Partial repairs, made by the master in good faith, at the port of distress, in order to sail his vessel to another port for full repairs at a less expense, and not for the purpose of restoring the vessel and continuing the voyage, are to be deemed acts done in preserving the property insured, which do not impair the owner's right to abandon. *id.*
  10. A person insuring the cargo of a canal boat, generally, may in case of a loss recover upon proving a special interest in the cargo, as a common carrier. *Van Natta v. Mutual Security Ins. Co.* 490
  11. A party possessing merely a special interest in the subject matter insured, may always recover the value of that special interest, on an insurance of the entire subject matter. *id.*
  12. In a declaration upon a policy of insurance on the cargo of a canal boat, it is a sufficient averment of the plaintiff's interest to allege that the insurance was for the account and benefit of the plaintiff as a common carrier. *id.*
  13. And it is a sufficient averment of the liability incurred, for the plaintiff to state, in such a declaration, that an amount of goods exceeding that mentioned in the policy was entrusted to him as carrier, that they were consumed by fire, and that the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment by the plaintiff, to the owners. *id.*
  14. In a declaration upon a policy of insurance, a general averment of the plaintiff's interest in the property insured is sufficient. *id.*
  15. Capstans of locust partly prepared, for vessels which the insured was building were held to be within his policy, "on his stock of ship timber, including locust, &c." *Webb v. National Fire Ins. Co.*, 497
  16. On the construction of a policy of insurance against fire, effected on a ship builder's stock of ship timber, "contained in the yard bounded by" three specified streets and the river, (in the city of New York,) proof was received to the effect that it was usual for the owners of ship yards in that city, to keep their stock of timber on the sidewalks, and in the streets in the vicinity of their yards, as much so as within the yards. Some of the timber of the insured, lay across the sidewalks, partly in the street, and partly on the land of the insured, which was

only partially fencod. *Held*, that the evidence was properly received, to show what was the meaning of the terms "stock of ship timber in a ship yard," as used by the parties in the policy, and to define the term, yard of a ship builder. And there being no contradictory testimony, *held*, that the insured was entitled to recover for the loss of his timber, situated in the streets adjacent to his land. *id.*

See SHIPS and SHIPPING, 1, 2.

## J

### JOINT DEBTORS.

See AGREEMENT, 9, 10.  
JUDGMENT and EXECUTION.

### JUDGMENT AND EXECUTION.

1. A co-partner, after dissolution, may, under the joint debtor act, give a confession of judgment in a suit actually brought against him and his partner, (the latter not being served with process,) which will make the judgment evidence of the amount of the debt, in the same manner as if he had liquidated an account, and let judgment go by default. *Oakley v. Aspinwall*, (a) 7
2. In a proceeding by way of foreign attachment, for a debt upon which a judgment has been recovered against all the joint debtors, some of whom were not served with process, it is sufficient to describe the debt claimed as being founded on the judgment, without mentioning the original cause of action for which it was recovered; although such cause of action must be proved, to establish the demand against those who were not served. *id.*
3. Where a person who contracted a debt in his own name, had confessed judgment in a joint suit brought

(a) After the text was printed, *ante* page 38, the court of appeals decided that the judgment of reversal in this cause was irregularly entered, and recalled the remittitur. The case is thus still pending and undecided in that court.

against himself and another sued as his partner, upon whom process had not been served, whereupon judgment had been entered against both, under the joint debtor act, and a suit was brought, founded upon such judgment, which was defended by the party who had not been served; it was *held*, that the debtor who confessed the judgment, was on the ground of interest, not a competent witness for the plaintiff. *id.*

4. Voluntary assignees of a defendant in an execution, who become such after a levy, are not *strangers* within the meaning of the rule which requires an officer justifying against a stranger, to show a judgment as well as an execution. *Heath v. Westervelt*, 110
5. It is sufficient in an action by such assignees against a sheriff, for the latter to produce his execution, and the former cannot impair his right to retain the goods levied, by attacking the judgment. *id.*
6. *Nul tiel record*, pleaded in an action of debt on judgment, is a plea of the general issue, within the provision of the statute authorizing notice of special matter to be given whenever the general issue is pleaded. *Gassner v. Sandford*, 440
7. The statute authorizing a defendant to give notice of his defence, instead of pleading it, is a remedial act, and should be construed liberally. *id.*
8. In an action of debt upon judgment brought after a great lapse of time from the entry of the judgment, it is competent for the defendant to show that an execution was issued upon the judgment soon after its recovery; that the defendant had property which could be reached by the process; that the officer having charge of the same is dead, and his papers missing; and that the execution has not been returned to the proper office. These facts unexplained, will warrant a jury in finding for the defendant. *id.*
9. A judgment is an express contract of record, and as such a contract, may be sued in an assistant justice's court *McGuire v. Gallagher*, 402
10. A justice's judgment, recovered be-

- fore the code of procedure took effect, is not within the provision of the code prohibiting suits upon such judgments within two years after their rendition. *id.*
11. *Semble*, an assistant justice's court, is a court of a justice of the peace, within the meaning of the section of the code which regulates actions on judgments. *id.*
12. A plea to a bill charging fraud in procuring a surrogate's decree, which merely sets up the decree and alleges that all the parties in interest had notice of the proceedings, without denying the fraud, is bad. *Lawrence v. Pool*, 540
13. An action in the nature of a former creditor's suit, may be maintained, where an execution was issued and returned unsatisfied before July 1, 1848, when the code of procedure took effect. *Dunham v. Nicholson*, 636
14. Such a suit is not an action on the judgment, within the meaning of the prohibition in the code. *id.*
15. On an order, (in equity,) overruling a demurrer with costs, the prevailing party, may under the act of 1847, tax his costs and collect the same by a precept in the nature of an execution against personal property. *Poillon v. Houghton*, 649
16. It is not necessary to enrol such an order. The taxed costs, must however be filed, before such an execution can be issued. *id.*
17. A confession of judgment, without action, is not authorized by the code, on a demand for a trespass upon real and personal property. *Boutel v. Owens*, 655
18. A confession of judgment, out of court, by a defendant in custody, on an arrest at the suit of the plaintiff for the cause of action confessed, made without the counsel, advice or presence of some attorney, named by the defendant, and attending at his request, to inform him of the nature and effect of the confession before he signed it; is void, and the confession and judgment will be set aside on motion. *id.*
19. A party obtaining a verdict, is not bound to wait four days before entering and perfecting his judgment. *Droz v. Lakey*, 661
20. The four days mentioned in the code, after which judgment becomes final, are intended to enable the losing party to obtain a stay of proceedings, in reference to a case. *id.*
21. If he obtain an order staying proceedings within the four days, he may move to set aside the verdict as against evidence, notwithstanding the entry of the judgment. *id.*
22. The code of procedure has not repealed or altered the provisions of the revised statutes, prescribing the security and the terms on which injunctions may issue to stay proceedings at law. *Cook v. Dickerson*, 691
23. An injunction to stay an execution, at the suit of the defendant, granted without a deposit and bond, or an order of the court dispensing with the deposit, and allowing a bond in lieu of it and a bond executed accordingly, is irregular, and will be set aside. *id.*
24. The fraud in the recovery of the judgment, which will enable the court to dispense with a deposit and bond, is such a fraud as a false statement, a substitution of one paper for another, or the like. A failure to perform a promise or condition on which the judgment was given, is not such a fraud. *id.*
- See CREDITOR'S SUIT, 1, 2, 6, 7, 11 to 13.  
PRACTICE, Judgment, Execution.

## JURISDICTION.

1. The courts of common law in the several states have jurisdiction to determine questions of salvage, in cases which, in other respects, are within the scope of their established jurisdiction. *Cashmere v. De Wolf*, 379
2. The jurisdiction of the United States courts in admiralty over questions of salvage, is to that extent concurrent, and not exclusive. *id.*
3. A state court having law and equity powers, may entertain a suit to redeem property claimed to be held for a sal-

vage lien, to enforce which salvage no suit is pending in admiralty ; and may restrain the removal of the property by injunction, appoint a receiver for its preservation and for its sale, where perishable, and ascertain the salvage liens and decree payment to the parties entitled. *id*

4. The superior court, as now constituted, is co-ordinate with the supreme court. The decisions of the latter are not authoritative, although to be treated with great deference and respect. *Ford v. Bubcock*, 518

5. An attachment against property, under section 227 of the amended code, cannot be issued in this court, except in those actions in which the court has jurisdiction, e. g. by the residence of the defendants ; or has acquired it, by the service of process on them. *Fisher v. Curtis*, 660

6. An attachment against a non-resident, issued before, but served at the same time with the summons, is irregular and will be set aside. *id*

7. This court will not sanction any attempt by fraud or misrepresentation, to bring a party within its jurisdiction. *Carpenter v. Spooner*, 717

8. Where a party having been induced by a false statement, to come within the jurisdiction of the court, for the purpose, was then served with a summons and complaint in an action in this court, the service was, on motion, set aside. *id*.

See TRADE MARKS.

## JUSTICES COURTS.

See ASSISTANT JUSTICES COURTS.

## L

## LANDLORD AND TENANT.

1. In an action for the recovery of rent, upon a lease which provided for the landlord's entering on the premises to make repairs during the term, the tenant cannot *recoup* his damages occasioned by negligent and tortious be-

havior of the landlord and his servants, in making such repairs. *Cram v. Dresser*, 120

2. The injury in such a case, does not arise from the breach of any covenant or stipulation of the landlord ; nor does it grow out of the terms or consideration of the contract entered into between the parties. It is as distinct and independent a wrong, as any committed upon the tenant by a stranger. *id*.

3. A wrongful act of the landlord, causing great inconvenience and trouble to the tenant's family, and keeping the demised tenement in confusion and disorder for a long period ; cannot be set up as an eviction, where the tenant has continued in possession for a year after the injury ceased. *id*.

4. On a formal lease for one year, was indorsed an agreement continuing it another year at an advanced rent. During the latter term, a second agreement was indorsed, whereby "the within lease" was "extended the further period of one year, without alteration." *Held*, that both the previous instruments were intended by the expression, "within lease." *id*.

5. Where premises have been demised for a term of years, and are in the actual occupation of the tenant when a penalty is incurred upon such premises, for a violation of an ordinance of a municipal corporation, the tenant is liable for the penalty, and not the landlord. *City of New York v. Corlies*, 301

6. A landlord who owns land adjoining the demised premises, has a right to build on such land, though he may thereby obstruct and darken the windows in the tenement demised. *Palmer v. Wetmore*, 316

7. Such an act exercised on land not embraced in the demise, cannot operate as an eviction, even if it were a ground for damages. *id*.

8. The plaintiff was the grauttee of premises, occupied by the defendants at the time of his purchase, under a lease from the grantor. The deed to the plaintiff was subject to a mortgage upon the premises, and was unrecord-

- ed. The defendants had attorned to the plaintiff, and paid rent to him. Subsequently the mortgage was foreclosed, but the plaintiff was not made a party to the suit. The premises were sold by a master, on the 7th of April, and bid off by M., under whom the defendants claimed; but M. did not pay the purchase money, until the 5th of May, when he took a deed from the master, and had it recorded. In an action by the plaintiff to recover the rent due on the 1st of May next after the sale; *Held*, that his claim to the rent was unaffected by the foreclosure proceedings, and that his title remained valid until it was divested by the recording of the master's deed. *Strong v. Dollner*, 444
9. *Held also*, that the recording of the master's deed had no relation back to the time of the sale, so as to divest rights of action previously accrued to the plaintiff by virtue of his unrecorded deed. *id.*
10. Where one not a party to a lease, is shown to be in possession of demised premises, in subordination to such lease, without more; the law presumes, in favor of the lessor, that he is an assignee of the lessee. *Durando v. Wyman*, 597
11. This presumption is rebutted by proof that during the possession of the third party, the lessor received from the lessee a surrender of the term. *id.*
12. Such surrender, if produced by the lessor, is an admission that the lessee, and not the occupant, was at its date, the tenant of the lessor. *id.*

## LEASE.

See LANDLORD AND TENANT.

## LIBEL.

1. Where, in an action for a libel, the defence set up is that the words were used in the course of a judicial proceeding, and were therefore privileged, the true question is whether they were relevant and pertinent to the matter before the court. *Warner v. Paine*, 195
2. As respects matter pertinent and material, the privilege of parties, attorneys, and counsel is complete, and malice cannot be predicated of what is said or written by them. *id.*
3. If a fact be material and pertinent, a party is privileged and protected in setting it forth in an affidavit, though he may have employed stronger and coarser words than are consistent with the rules of good taste and proper decorum. *id.*
4. Accordingly, where, in an affidavit to oppose a motion, the defendant alleged that the plaintiff had been guilty of perjury in his affidavit in support of the motion, it appearing that the falsity of the statements in the plaintiff's affidavit was a material question; *Held*, that no action would lie against the defendant for a libel. *id.*

## LIEN.

See PRINCIPAL AND AGENT, 6.

## LIMITATION OF ACTIONS.

1. Where a part of the items of an account bear date within six years before suit brought, they will not draw after them items of a longer standing than six years, so as to protect them from the operation of the statute of limitations; unless there have been mutual accounts, and reciprocal demands, between the parties. *Palmer v. City of New York*, 318
2. The provision in the statute of limitations, that if when any cause of action accrue against any person, he shall be out of this state, such action may be commenced within the terms by the statute before limited, after the return of such person into the state; applies to both residents and non-residents. *Ford v. Babcock*, 518
3. A return into the state, is sufficient to set the statute in motion, without any residence here. *id.*
4. Facts showing the defendant to be within the exception in that clause of the statute, need not be negatived in his plea. It is incumbent on the plaintiff to prove such facts. *id.*

5. In a plea that six years have elapsed since the return of the defendant into this state, it is not necessary to aver that such return was public and notorious, so that the plaintiff with due diligence might have arrested him. It is sufficient to plead the return in the words of the statute. On the trial, in order to sustain the plea, the defendant must prove such a public and notorious return. *id.*
6. The new exception created by the revised statutes, viz. that "if after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action," is not confined to residents of this state when the cause of action accrued. It extends also to non-residents. *id.*
7. If there be successive absences, they must be accumulated and deducted from the term of limitation allowed by the statute. *id.*
8. Therefore, under the present statute, it must appear that the defendant was within the state during six years after the cause of action accrued, in order to create a bar coming within the limitation of six years. *id.*
9. The case of *Cole v. Jesup*, 2 Barb S. C. R. 309, commented upon, and its conclusion denied. *id.*
10. A plea to a bill to set aside a settled account on the ground of fraud, is not rendered double by setting up that the cause of action arose more than ten years, and the fraud, if any, was discovered more than six years, before the bill was exhibited.<sup>1</sup> Both averments are necessary to constitute a bar, under the limitation in the statute relied upon as a defence. *Boggs v. Forsyth*, 583
11. In such a case, the plea need not deny the fraud charged in the bill. *id.*
12. An answer, admitting certain facts charged as those from which the plaintiff claims to have first derived notice of the alleged fraud, denying that he did thereby first acquire such notice, and setting up facts showing a notice at a much earlier period, which latter

were not inconsistent with the facts admitted; is a sufficient answer in support of such a plea of the statute. *id.*

### LOAN COMMISSIONERS.

1. Under the act for loaning the United States deposit fund, (Laws of 1837, ch. 150,) on the failure of the borrower to pay the annual interest at the time prescribed, the loan commissioners became seised of the lands mortgaged, so that the mortgagor (not having paid the debt and costs after the default and before the sale,) cannot maintain ejectment to obtain possession. *Olmsted v. Elder*, 325
2. The production of the mortgage having no entry upon it of the payment of interest, and the efflux of time, are sufficient to establish presumptively the default in the payment of the annual interest. *id.*
3. The loan commissioners having assumed to sell on such a default, and conveyed to a purchaser who entered into possession; it was *held*, that if the sale were irregular, the deed transferred the mortgage to the purchaser, who thus being a mortgagee in possession, could retain the possession until redemption. *id.*

### ME

### MARINE COURT.

1. The marine court, although for some purposes a court of record, is not authorized to give a judgment upon a default, without proof of the plaintiff's demand. *Carter v. Dallimore*, 222
2. Although the appellate court will not weigh the evidence below so as to reverse if it merely preponderate against the judgment; a material defect of proof is fatal to the judgment below. *id.*
3. Where a summons in the marine court required the defendants to answer in a plea for goods sold to the defendants, damage fifty dollars, the plaintiffs cannot take judgment by default for more than fifty dollars. If



they do, the judgment will be reversed.  
*Partridge v. Thayer*, 227

4. The code of procedure regulating appeals from the marine court, in effect requires the appellant to state the substance of the proceedings below, where the alleged error consists of those; and the substance of the testimony when the latter bears upon the question sought to be reviewed. Where the whole reliance of the appellant is upon an error which cannot be remedied or affected by the testimony, it is not necessary in his affidavit to set forth the evidence. *id.*
5. Since the code of procedure, there is no provision nor practice requiring bills of particulars to be given. *Winslow v. Kierski*, 304
6. Where the marine court rendered judgment against the plaintiff for not furnishing such a bill, after he had exhibited his complaint for services as attorney in two specified suits since the code; the judgment was reversed. *id.*
7. The plaintiff may be compelled to amend an insufficient complaint, before requiring the defendant to answer. *id.*

See APPEALS.

ASSISTANT JUSTICES COURTS, 3, 4, 9 to 13.

## MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE.

## MISTAKE.

See BILLS OF EXCHANGE, 35 to 41.  
PAYMENT, 3.

## MONEY HAD AND RECEIVED, LENT AND ADVANCED, AND PAID c.

See AGREEMENT, 4 to 12, 22 to 25.

## MORTGAGE.

1. The plaintiff was the grantee of premises, occupied by the defendants at the time of his purchase, under a lease from the grantor. The deed to the plaintiff was subject to a mortgage upon the premises, and was unrecord-

ed. The defendants had attorned to the plaintiff, and paid rent to him. Subsequently the mortgage was foreclosed, but the plaintiff was not made a party to the suit. The premises were sold by a master, on the 7th of April, and bid off by M., under whom the defendants claimed; but M. did not pay the purchase money, until the 5th of May, when he took a deed from the master, and had it recorded. In an action by the plaintiff to recover the rent due on the 1st of May next after the sale; *Held*, that his claim to the rent was unaffected by the foreclosure proceedings, and that his title remained valid until it was divested by the recording of the master's deed. *Strong v. Dollner*, 444

2. *Held also*, that the recording of the master's deed had no relation back to the time of the sale, so as to divest rights of action previously accrued to the plaintiff by virtue of his unrecorded deed. *id.*
3. Although the recording act makes an unrecorded conveyance void as against a subsequent purchaser in good faith, for value, whose deed is recorded first, it does not avoid the former as of a time prior to the execution of the latter. It does not transfer to such subsequent purchaser rights in respect of the property, against third persons, which were vested in the owner holding under the unrecorded deed, prior to the execution of the subsequent conveyance. *id.*
4. A bid at a master's sale, its acceptance by the master, and the payment of a per centage upon the purchase money, work no change in the title, even in equity. The purchase is inchoate and defeasible until the acceptance of the title, on his part, and the confirmation of the report of sale, on the part of the court. *id.*
5. An equity of redemption belonging to an intestate, does not pass to his administrator on its being converted into a surplus by a foreclosure and sale. *Cox v. McBurney*, 561
6. Such surplus will not be awarded to a grantee of the mortgagor, the grant to whom was made with the intent to defraud creditors. *id.*



7. A court of equity will not open a default, or relieve a party from the consequences of his own neglect, in order to enable him to set up an unconscientious or a dishonest defence. *King v. Merchants' Exchange Co.* 693
8. So held, where after a decree by default for the foreclosure of a mortgage executed to secure bonds of a corporation, the consideration of which was money advanced to and used by the corporation for the purposes of its creation; the corporation sought to be let in to defend, on the ground that it had no power to execute such bonds and mortgage. *id.*
9. In a foreclosure suit, the court will permit the plaintiff, on receiving his debt and costs, to dismiss his suit, without paying costs to junior incumbrancers, who have appeared to protect their rights. So as to the mortgagor, personally liable for the debt, who has conveyed the mortgaged premises subject to its payment. *Gallagher v. Egan,* 742
10. Where a sheriff serves with the summons, a notice of the objects of a suit for foreclosure, the plaintiff may tax for such service, as a necessary disbursement, the sum of thirty-seven and one half cents, in addition to the sheriff's fee for serving the summons. *id.*
11. The sheriff is entitled to only one fee, of twelve and one-half cents, for returning a summons with his certificate of service. *id.*

See LOAN COMMISSIONERS.

#### MORTGAGE OF CHATTELS.

1. In order to preserve the lien of a chattel mortgage from year to year, a copy thereof, with a statement exhibiting the interest of the mortgagee in the property, must be filed in the office of the register or clerk, within thirty days preceding the expiration of one year from the time of filing the mortgage; and a new copy must be filed every successive year. *Nitchie v. Townsend,* 299
2. Every copy thus filed, is to be regarded as a new mortgage. *id.*
3. N. was the holder of a chattel mortgage upon the property of C., which was filed June 22, 1846. A copy, with a statement of the mortgagee's interest, was filed June 18, 1847. T. recovered a judgment against C., and issued an execution thereon, by virtue of which the mortgage property was levied upon on the 19th of June, 1848, at noon. A second copy of the mortgage, with the statement, was filed on the same day, at 40 minutes past 2 o'clock, P. M., after the levy, (the 18th being Sunday.) *Held,* that the copy filed on the 18th of June, 1847, ceased to be valid as a lien against creditors, in one year from that time; that although the 18th of June was Sunday, that day must be computed; and that the execution must prevail, as against the mortgage. *id.*
4. Where an act is expressly prohibited by a statute, all contracts growing out of its performance are void. *Bell v. Quin,* 146

#### MUNICIPAL CORPORATION.

1. The legislature has no authority to grant private property for private uses, making compensation to the owner, unless by his consent. *Embury v. Conner,* 98
2. This is prohibited, as well by the spirit of the provision in the constitution that private property shall not be taken for public use, without just compensation, as by the constitutional provision, that no person shall be deprived of life, liberty, or property, without due process of law. *id.*
3. The provision in the act relative to the city of New York, allowing the corporation on opening or widening a street, which improvement takes a part of an entire lot of ground; in the discretion of the commissioners to include in their estimate and assessment the whole of such lot, awarding damages to the owner, and thereupon the title of the owner to be divested in the portion of the lot not required for the street, and the same to become vested in the corporation; is unconstitutional and void, as to such residue not required for the street. *id.*

See *Ejectment*, 1.

5. So a promissory note given by one of two parties to the other, for the latter's share of the profits received by the former in a transaction forbidden by law, cannot be recovered by the payee or his voluntary assignee. *id.*
6. The charter of a municipal corporation enacted that no member of the common council, during his official term, should be interested in any contract, the expenses or consideration whereof was to be paid under any ordinance of the common council. A member of the board was interested with the defendant, in a contract for supplying the corporation with coal, and received the defendant's note for half the profits of the contract. *Held*, that his assignee could not recover the note against the defendant. *id.*
7. The provisions of the ordinances of the corporation of the city of New York, imposing penalties in respect of the using or obstructing the *public* wharves, docks, piers and slips, do not extend to wharves, &c., owned by private citizens. *Vandewater v. City of New York*, 258
8. The distinction has always been kept up in the state and municipal legislation, between the wharves, piers and slips, owned by the city, and those owned by individuals; and the latter are not *public* within the meaning of that word in laws and ordinances on the subject. *id.*
9. Where premises have been demised for a term of years, and are in the actual occupation of the tenant when a penalty is incurred upon such premises, for a violation of an ordinance of a municipal corporation, the tenant is liable for the penalty, and not the landlord. *Corlies v. City of New York*, 301
10. A special justice of the city of New York, receiving an annual salary for his services in that capacity, cannot recover extra compensation for services performed on Sunday. *Palmer v. City of New York*, 318
11. This is so especially, where he has, at the end of every quarter during his term of office, rendered an account against the corporation for the amount of his salary, and has received his pay, without making any claim for extra compensation. *id.*
12. A public officer receiving a fixed salary for his services, cannot rightfully claim a compensation beyond his salary, for performing a new duty, or one imposed upon him since the salary was fixed; much less if he accept the office with full knowledge of the resolution requiring the extra duties to be performed. *id.*
13. The corporation of the city of New York, under the statutes regulating the making of sewers, paving the streets, &c., may execute the work at its own expense, and then make an assessment of the expense upon the property benefited, for the first time after the work is completed. *Wetmore v. Campbell*, 341
14. The circumstance, that the street commissioner in contracting for the making of a sewer, stipulates with the contractor that he shall not receive payment until the assessment laid for the purpose shall be collected, does not affect the power of the corporation to make the assessment after the sewer is completed. *id.*
15. The election of the corporation as to making an estimate and assessment first, and making the sewer afterwards, or first making the sewer, and then laying the assessment, is determined by actually proceeding to execute the work before making an assessment. *id.*
16. The corporate liability to pay the contract price, is, in such case, incurred to the contractor. *id.*
17. The statutes do not authorize the collection of such an assessment from an occupant of premises benefited, who has not been assessed as such occupant by name. *id.*
18. The authority to the corporation to appoint a person to receive the assessments, and if not paid, to levy the same by a distress warrant, is a plain authority to issue the warrant to the collector appointed to receive them. *id.*
19. Where a collector, by virtue of an assessment warrant, levied upon the

- goods of a person not named in the warrant nor liable to pay the assessment, threatened to remove the goods, gave him notice he would sell on a day specified, if he did not previously pay; it was *held*, that payment made when the collector was about to remove the goods for sale, was not voluntarily made, and that the collector was liable in trespass. *id.*
20. A claim for services rendered as counsel for the board of supervisors of a county, and its various committees, is a *county charge*. *Brady v. Supervisors of the City of New York*, 460
21. No action for the recovery of a county charge, can be maintained against a county, or the board of supervisors. *id.*
22. Suits against a county can be brought only for such causes of action or controversies, as cannot be settled and adjusted by the board of supervisors, in the exercise of their ordinary powers, such as torts, malfeasances of county officers, and the like. *id.*
23. The supervisors of a county, as such, or as a board, are not a body corporate, and possess no powers as a corporation. The corporation is the county. *id.*
24. Where the owners of city lots which had been sold for the non-payment of void assessments, redeemed the same by paying to the street commissioner the amounts for which the lots were sold, with interest and costs; *Held*, that the payments being voluntary, and not made under a mistake of fact, or of law, could not be recovered back, in an action against the city. *Fleetwood v. City of New York*, 475.
25. The muniments of title, upon an assessment sale, consist of several proceedings all of which are indispensable to its validity; and if one be wanting, no title is conferred. *id.*
26. In the absence of either of the proceedings forming an essential part of the record of an assessment title, such title is void on its face. *id.*
27. A void assessment constitutes no cloud upon the title; and the payment of such an assessment, by the owner of the property, cannot be considered compulsory. *id.*
28. The cases respecting duress of personal property, in which it has been held that payments made for its relief are involuntary, and may be recovered back, are inapplicable to real estate. *id.*
29. Where a party, without any legal compulsion or duress of goods, yields to the assertion of an adverse claim, by paying the amount, he cannot detract from the force of his concession, by protesting against the legality of the claim. In such a case the payment nullifies the protest. *id.*
30. The statute relative to opening streets in the city of New York, confers upon the commissioners of estimate and assessment, the power to assess an *occupant* of lands benefited by the improvement. *Gilbert v. Havemeyer*, 506
31. An occupant is a person "*interested*" in the lands which he possesses, within the meaning of the statute. *id.*
32. Where commissioners of estimate and assessment described minutely a parcel of land assessed for benefit, and stated that it was owned by A., and was occupied by G., P. and T., and they assessed upon it the sum of \$123; *Held*, that this was a sufficient assessment not only of the lot, but of A. as owner, and of G., P. and T. as occupants or parties interested. *id.*
33. *Held also* that it was to be presumed, from their assessing the owner and occupant jointly, for the entire sum, that the commissioners did not fully know the respective estates and interests of the parties. *id.*
34. An assessment, on being confirmed, becomes a lien upon the lot assessed, and the owner and occupant, and each of them, becomes liable to pay the same. If it is not paid, on demand, the corporation may collect it by a warrant against the goods of the owner or occupant. *id.*
35. The statute authorizes the corpora-

tion to appoint a collector, with power to levy an assessment upon the goods of the person assessed. *id*

36. A warrant is not void because it directs the assessment to be collected of persons who may be occupying the premises, as well as of those assessed by name. It cannot be levied upon the goods of occupants who have not been assessed by name; but the insertion of such a direction in the warrant will not prejudice those against whom it is properly issued. *id.*

37. A warrant which omits to state the names of the persons assessed, is fatally defective. *id.*

38. A warrant, issued for the collection of an assessment, should state when the assessment was confirmed by the supreme court; the names of the persons assessed, both owners and occupants, who have neglected to make payment; the amount of the assessment; and should describe the premises assessed. These particulars, if not contained in the warrant itself, should be inserted in the schedule forming a part of it. *id.*

39. The warrant should contain all the facts necessary to show that the person upon whose goods it is levied is liable to pay the sum claimed from him. *id.*

40. A grant of a municipal corporation, having the right to land on the shore and under the water of a river or harbor, of the land under water from high water mark, to A. in fee, reserving so much of the soil under water as was required for a street, which was to become the exterior line of the filling up of such land, and the same, as well as the wharves built out therefrom, were to be public streets and wharves; and which grant contained a covenant of the corporation, that A. and his heirs &c., fulfilling their covenants, might have and enjoy the wharfage and all the advantages of the wharves to be erected;—conveys conditionally in respect of the wharf or bulkhead made by the street, an interest, which is real property; and it is not to be considered as a mere covenant. *Boreel v. City of New York*, 552

## MUTUAL INSURANCE COMPANY.

See CORPORATION, 8 to 12.

## N

### NE EXEAT.

See PRACTICE, *Ne Exeat*.

### NEW TRIAL.

See PRACTICE, *New Trial*.

### NEW YORK, CITY OF.

See MUNICIPAL CORPORATION.

## O

### OFFICER.

1. The act of December 10, 1847, in relation to the fees of certain officers in the city of New York, is neither a private nor a local act, within the meaning of the 16th section of the third article of the constitution, which provides that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. *Conner v. The City of New York*, 355
2. An officer may be local, in the sense and for the purposes of that provision, and yet a statute respecting the duties and fees of the office may be public and general. *id.*
3. When an office is created by the constitution, and the terms and salary thereof are defined, the people, in their sovereign capacity, may, by a new constitution, terminate both, without regard to the rights, the interests, or the expectations of the incumbent. *id.*
4. An office created by law may be repealed by law, without regard to the term or future salary of the officer entrusted with its exercise. *id.*

5. Officers created by the constitution, the tenure and compensation being fixed by a statute, are equally within the legislative control, as to such tenure and compensation, except that the office cannot be virtually abolished by a colorable reduction of the compensation, or by taking it away altogether. *id*

6. There is no *contract*, express or implied, between a public officer and the government, whose agent he is. Nor have public officers any proprietary interest in their offices, or any *property* in the prospective compensation attached thereto, whether it be in the shape of salary or of fees. *id.*

7. A public officer is an agent, elected or appointed to perform certain political duties in the administration of the government. The legislative power which prescribes his duties and provides a compensation, may alter the duties at pleasure. It may increase them without enhancing the compensation; and, in like manner, it may diminish the compensation without lessening the duties. *id.*

8. If the officer receives fees, the legislature may abolish some, reduce others, or take away all, and compensate him by a salary. His right to the emoluments of the office is held subject to all these modifications. *id.*

9. And the legislature, in substituting a salary for fees, may continue the fees, and direct them to be paid by the officer into the public treasury. *id.*

10. An act requiring the fees of the office to be paid into the public treasury, is not unconstitutional on the ground that it imposes a *tax*, without specifying the object to which the tax shall be applied. *id.*

11. A public officer receiving a fixed salary for his services, cannot rightfully claim a compensation beyond his salary, for performing a new duty, or one imposed upon him since the salary was fixed; much less if he accept the office with full knowledge of the resolution requiring the extra duties to be performed. *Palmer v. City of New York*, 318

## ORDER.

See *BILLS OF EXCHANGE*, 1.

## P

### PAROL EVIDENCE.

See *EVIDENCE*, 8 to 12.

### PARTIES.

See *AGREEMENT*, 6.  
*PRACTICE, Parties.*

### PARTITION.

1. A partition cannot be made of land which an attorney is authorized by an irrevocable power from the tenant in common, to sell for the benefit of all the owners; without the consent of all to such partition. *Selden v. Vermilya*, 568

2. So of lands conveyed to a trustee where each is entitled to require a sale of the whole for the benefit of creditors, even after the residuary interest has been extinguished. *id.*

### PARTNERSHIP.

1. By the law merchant, recognized by the commercial world, a participation in the uncertain profits of trade, as a return for capital advanced, constitutes such participator a partner in the concern in which the capital is invested, and makes him liable to third persons, though he is to receive back his whole capital and profits, without deduction for losses or liabilities of the concern. *Oakley v. Aspinwall*, 7

2. Though it be proved that the law of the country where a contract was made, required all contracts of partnership to be reduced to public documents, and registered, a secret partner of a firm which has not complied with such law, will be held liable to the creditors of the firm, though the contract of co-partnership be void, as between the partners. *id*

3. Where the accounts current between a house and a person sought to be charged as a secret partner, showed a division of "*profits of certain transactions*" annually, "*as per detailed accounts*" rendered with the accounts current, and the individual sought to be charged had *destroyed* the detailed accounts; it was *held*, that such destruction, and the failure to prove what the "certain transactions" were, afforded ground to infer that such profits arose from the general business of the house. *id.*
  4. A co-partner, after dissolution, may, under the joint debtor act, give a confession of judgment in a suit actually brought against him and his partner, (the latter not being served with process,) which will make the judgment evidence of the amount of the debt, in the same manner as if he had liquidated an account, and let judgment go by default. *id.*
  5. A member of a co-partnership firm is liable either in assumpsit or in an action on the case, for the consequences of frauds practised by his co-partner, in the transaction of the partnership business, although he was entirely ignorant of such frauds, and derived no benefit therefrom. *Hawkins v. Appleby*, 421
  6. Where goods are obtained for the use of a firm, by means of the fraud of one of its members, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act of the one who obtained them, and will be placed in the same situation, in reference to the rights of the vendors of the goods, as if he had directed his partner to procure the property, or had concurred with him in the transaction. *id.*
  7. And where a partner, on being notified of a fraud committed by his co-partner, and that the firm will be held liable therefor, omits to repudiate or disaffirm what has been done by his co-partner, he will be held to have adopted and ratified the fraud, and will, from thenceforth, be deemed a joint wrong-doer. *id.*
  8. To constitute real estate partnership property, which is purchased with partnership funds, it must be bought or used for partnership purposes. *Cox v. McBurney*, 561
  9. Where land was thus purchased in the name of A. one of two partners, not intended or used for the purposes of the partnership; it was held, that T. the other partner, who survived A. took no estate or interest in it as survivor, and no interest in the same passed to his assignee in bankruptcy. *id.*
  10. So far as T.'s money may be deemed to have gone to the purchase in A.'s name, there would be no use or trust for T.; but his then creditors could reach his proportion of it, under the statute of trusts. *id.*
- See EVIDENCE, 1 to 3.
- PAYMENT.
1. Where, in an action on the case for deceit, in falsely representing the note of a third person, turned out by the defendants in payment for goods purchased, to be good, it appears that the plaintiffs, on discovering the insolvency of the makers, disavowed the ownership of the note, and notified the defendants that they were held liable for the price of the goods, who insisted on retaining the goods, and omitted to pay the price and receive back the note, it seems this will be deemed a waiver of any formal tender of the note before suit brought. *Hawkins v. Appleby*, 421
  2. Under such circumstances, it is sufficient for the plaintiffs to tender the note upon the argument. *id.*
  3. Where the owners of city lots which had been sold for the non-payment of void assessments, redeemed the same by paying to the street commissioner the amount for which the lots were sold, with interest and costs; *Held*, that the payments being voluntary, and not made under a mistake of fact, or of law, could not be recovered back, in an action against the city.—*Fleetwood v. City of New York*, 475
  4. In the absence of either of the proceedings forming an essential part of

the record of an assessment title, such title is void on its face. *id.*

5. A void assessment constitutes no cloud upon the title; and the payment of such an assessment, by the owner of the property, cannot be considered compulsory. *id.*

6. The cases respecting duress of personal property, in which it has been held that payments made for its relief are involuntary, and may be recovered back, are inapplicable to real estate. *id.*

7. Where a party, without any legal compulsion or duress of goods, yields to the assertion of an adverse claim, by paying the amount, he cannot detract from the force of his concession, by protesting against the legality of the claim. In such a case the payment nullifies the protest. *id.*

#### PLEADING.

1. An objection to a pleading, that it is argumentative, is ground for special demurrer only, and the demurrer must show in express terms what portion of the pleading constitutes the alleged argument. *Smith v. Oliphant*, 306

2. Where one plea covers several distinct causes of action, a replication to the plea singling out and supporting one of such causes, is not demurrable. *id.*

3. The money counts combined with a single *assumpsit* applied to the whole, may be treated in pleading as distinct causes of action. *id.*

4. *Nul tiel record*, pleaded in an action of debt on judgment, is a plea of the general issue, within the provision of the statute authorizing notice of special matter to be given whenever the general issue is pleaded. *Gassner v. Sandford*, 440

5. The statute authorizing a defendant to give notice of his defence, instead to pleading it, is a remedial act, and should be construed liberally. *id.*

6. In a declaration upon a policy of insurance on the cargo of a canal boat, it is a sufficient averment of the plaintiff's interest to allege that the insur-

ance was for the account and benefit of the plaintiff as a common carrier. *Van Natta v. Mutual Security Ins. Co.* 490

7. And it is a sufficient averment of the liability incurred, for the plaintiff to state, in such a declaration, that an amount of goods exceeding that mentioned in the policy was entrusted to him as carrier, that they were consumed by fire, and that the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment by the plaintiff, to the owners. *id.*

8. In a declaration upon a policy of insurance, a general averment of the plaintiff's interest in the property insured is sufficient. *id.*

9. A plea is not made double, by the averment of facts, which, without such averment, would be implied. *Ford v. Babcock*, 518

10. To render a plea double, its averments must set up more than one defence. *id.*

11. An unnecessary averment, not amounting to a defence, will not render a plea double. It may be rejected as surplusage. *id.*

12. Facts showing the defendant to be within the exception in the clause of the statute of limitations, need not be negatived in his plea. It is incumbent on the plaintiff to prove such facts. *id.*

13. A plea to a bill to set aside a settled account on the ground of fraud, is not rendered double by setting up that the cause of action arose more than ten years, and the fraud, if any, was discovered more than six years, before the bill was exhibited. Both averments are necessary to constitute a bar, under the limitation in the statute relied upon as a defence. *Boggs v. Forsyth*, 533

14. In such a case, the plea need not deny the fraud charged in the bill. *id.*

15. An answer, admitting certain facts charged as those from which the plaintiff claims to have first derived notice of the alleged fraud, denying that he did thereby first acquire such notice,



- and setting up acts showing a notice at a much earlier period, which latter were not inconsistent with the facts admitted; is a sufficient answer in support of such a plea of the statute. *id.*
16. A plea to a bill charging fraud in procuring a surrogate's decree, which merely sets up the decree and alleges that all the parties in interest had notice of the proceedings, without denying the fraud, is bad. *id.*
17. In equity, in the argument of a plea, the defendant cannot object to the sufficiency of the bill. *id.*
18. Where the affidavit verifying the complaint is defective, the remedy of the party is by a motion to set it aside, and not by demurrer. *Webb v. Clark*, 647
19. The party verifying a pleading under the code, must subscribe his name to such pleading or to the affidavit appended. *Laimbeer v. Allen*, 648
20. An answer, regular in all respects except in the omission of the signature of the party to its verification, should not be disregarded, until notice is given of the defect and an opportunity afforded to correct it. *id.*
21. A defendant cannot treat an amended complaint as a new suit, although it wholly change the nature of the action. His remedy, if any, is by a motion to set it aside. *Megrath v. Van Wyck*, 651
22. The complaint may be amended in the amount claimed by the plaintiff, in an action on contract for the recovery of money only, even after a reply repeating the original claim, and both pleadings verified. *Merchant v. N. Y. Life Ins. Co.* 669
23. Where an answer to the allegations of the complaint or some of them, might subject the defendant to a criminal prosecution, he need not admit or deny such allegations on oath. He must put in a sworn answer, in which he may state, that by answering on oath the particular allegations specified, he may subject himself to a criminal prosecution; and as to the residue of the complaint, he will answer in the usual manner. Such an answer will be deemed to put in issue the allegations of the complaint which the defendant excuses himself from answering. *Hill v. Muller*, 684
24. The plaintiff can demur to an answer, only for defects in respect of the new matter set up therein by way of avoidance. *Smith v. Greenin*, 702
25. Irrelevant or redundant matter in an answer, may be stricken out on motion, and in like manner uncertain or indefinite matter may be made more definite. *id.*
26. Immaterial matter cannot be demurred to. *id.*
27. The defendant's omission to answer an allegation of the complaint, is no ground of demurrer. *id.*
- See BOND, 1 to 4.  
CREDITOR'S SUIT, 8 to 10.  
JUDGMENT, &c., 12.  
PRACTICE.  
REPLEVIN, 1.  
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- See TRUST AND TRUSTEE, 2, 9 to 12.  
WILL.
- PRACTICE.
1. Action.
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- 22. *Injunction.*
- 23. *Issues of Law.*
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- 27. *New Trial.*
- 28. *Parties.*
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- 33. *Striking out Frivolous or Redundant matter.*
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- 35. *Warrant against Fraudulent Debtor.*

PRACTICE.

1. *Action.*

- 1. An action in the nature of the former creditor's suit, may be maintained, where an execution was issued and returned unsatisfied before July 1, 1848, when the code of procedure took effect. *Dunham v. Nicholson,* 636
- 2. Such a suit is not an action on the judgment, within the meaning of the prohibition in the code. *id.*
- 3. A factor or other mercantile agent, who contracts in his own name, on behalf of his principal, is a trustee of an express trust, within the meaning of section one hundred and thirteen of the code, and is the proper party to bring an action upon the contract. *Grinnell v. Schmidt,* 706
- 4. Under the code, a married woman may sue for a limited divorce, without the intervention of a next friend. *Shore v. Shore,* 715

2. *Amendment.*

- 5. If the report of a referee, to whom the cause was referred, omit any one issue, an amendment will be allowed. *Renouil v. Harris,* 641
- 6. Where after a default, the plaintiff amends his complaint, (not in mere matter of form,) he must serve the same on the defendant. A judgment entered thereon without such service, is irregular. *People v. Woods,* 652
- 7. The complaint may be amended in

the amount claimed by the plaintiff, in an action on contract for the recovery of money only, even after a reply repeating the original claim, and both pleadings verified. *Merchant v. New York Life Ins. Co.,* 669

3. *Answer.*

- 8. A frivolous answer in a creditor's suit, stricken out on motion, and an order for judgment made, with a direction for the examination of the defendant touching his property. *Dunham v. Nicholson,* 636
- 9. The party verifying a pleading under the code, must subscribe his name to such pleading or to the affidavit appended. *Laimbeer v. Allen,* 648
- 10. An answer, regular in all respects except in the omission of the signature of the party to its verification, should not be disregarded, until notice is given of the defect and an opportunity afforded to correct it. *id.*
- 11. A motion to strike irrelevant or redundant matter out of a pleading, will not be granted, where the party before moving, answers or replies to such pleading. *Corlies v. Delaplaine,* 680
- 12. Where an answer to the allegations of the complaint or some of them, might subject the defendant to a criminal prosecution, he need not admit or deny such allegations on oath. He must put in a sworn answer, in which he may state, that by answering on oath the particular allegations specified, he may subject himself to a criminal prosecution; and as to the residue of the complaint, he will answer in the usual manner. Such an answer will be deemed to put in issue the allegations of the complaint which the defendant excuses himself from answering. *Hill v. Muller,* 684

See PRACTICE, *Injunction*, 96, 97.

4. *Appeal.*

- 13. On an appeal from an order made by a justice at chambers, it is not necessary to execute an undertaking under the code of procedure. *Allen v. Johnson,* 629

14. The court cannot directly or indirectly, enlarge the time limited by the code for appealing from an order or judgment. *Renouil v. Harris*, 641
15. A motion to set aside a judgment for irregularity, does not suspend the time for appealing; and if the time elapse before the motion be decided, the right to appeal is lost. *id.*
16. A notice of the entry of the judgment, given to foreclose an appeal, is a proceeding in the cause, within the meaning of an order staying proceedings on the judgment and will be set aside as irregular. *Bagley v. Smith*, 651
17. The party deeming himself aggrieved by the report of referees, may appeal at once to the general term, from the judgment entered on the report, on the matters of law involved. *Leggett v. Mott*, 720
18. From the order of the judge at the special term, granting or denying the motion for a re-hearing on the referees' report, an appeal may be brought to the general term which will be heard with other calendar causes. *id.*
19. An appeal from an order granting an injunction, does not stay the operation of the injunction; and if the defendant violate it pending the appeal, an attachment will issue against him. *Stone v. Carlan*, 735
- See PRACTICE, Costs, 48 to 51.

#### 5. Appearance.

20. Where the defendant appears in the cause, though he omit to answer, he is entitled to notice of the adjustment of the costs; and a judgment entered without such notice, is irregular. *Elson v. New York Equitable Ins. Co.* 654

#### 6. Attachment.

21. An attachment against property, under section 227 of the amended code, cannot be issued in this court, except in those actions in which the court has jurisdiction, e. g. by the residence of the defendants; or has acquired it, by the service of process on them. *Fisher v. Curtis*, 660

22. An attachment against a non-resident, issued before, but served at the same time with a summons, is irregular and will be set aside. *id.*

23. A judge under section 302 of the code has power to punish as for a contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt, may therefore properly be made returnable before him, at his office. *Matter of Smethurst*, 724

24. Although the code gives the power of punishing disobedience of his orders to the judge, reference must be had to the revised statutes as to the mode in which that power is to be exercised. (2 R. S. 535.) *id.*

25. Under this statute a judge, upon due proof, may, in his discretion, issue an attachment in the first instance, against the party accused, to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court. *id.*

26. It seems, that in the first judicial district, the ordinary practice is, to give notice of motion for an attachment, or obtain an order to show cause. *id.*

27. Whether the affidavits upon which an attachment is issued, are sufficient to warrant its issuing, is a matter that cannot be reviewed on habeas corpus. *id.*

#### 7. Bail.

28. The concealment, removal and disposal of a piano by a female, does not subject her to be held to bail, under the 179th section of the code. *Tracy v. Leland*, 729
29. A female can be arrested only for wilfully, wantonly, or maliciously in-

juring property ; but not for a detention or conversion of it. *id.*

See PRACTICE, *Ne Exeat*, 113, 114.

### 8. Bill of Exceptions.

See PRACTICE, *Case*.

### 9. Bill of Particulars.

30. Since the code of procedure, there is no provision nor practice requiring bills of particulars to be given. *Winslow v. Kierski*, 304

31. Where the marine court rendered judgment against the plaintiff for not furnishing such a bill, after he had exhibited his complaint, for services as attorney in two specified suits since the code ; the judgment was reversed. *id.*

### 10. Case.

32. Where any exception is taken at the trial, the party may make a case, presenting such exception. *Huff v. Bennett*, 703

33. An order enlarging the time to make a case or bill of exceptions, is not a stay of proceedings. *id.*

34. Where at the trial, documentary evidence which proves itself, and on which no question can arise in the cause, except such as is apparent on its face, is unadvisedly omitted, and an objection taken thereupon ; the court will nevertheless permit the document to be produced upon the argument of the case ; and if there be no surprise apparent, or any point in which the defence was prejudiced by the omission at the trial, the court will regard it as having been produced at the trial. *Bank of Charleston v. Emeric*, 718

35. Upon a case made, a party cannot move to enter a non-suit, or for a new trial, on a ground not distinctly taken at the trial, if it be such as might have been obviated by proof, had it been presented at the trial. *N. Y. & Erie R. R. Co. v. Cook*, 732

### 11. Commission.

36. The issuing of a commission to take the testimony of a witness out of the state, though usually directed, is not a matter of strict right. *Ring v. Mott*, 638

37. Where a commission is likely to produce great injury to the adverse party, terms will be imposed, and in extreme cases it may be wholly refused. *id.*

38. Where sufficient time has elapsed, *prima facie*, to have obtained the return of a commission, issued with a stay of proceedings, the stay will be vacated on motion of the adverse party ; and on the cause being called for trial, the party taking the commission must establish the grounds for a further stay, if there be any, for the return of the commission. *Voss v. Fielden*, 690

### 12. Complaint.

39. Where the affidavit verifying the complaint is defective, the remedy of the party is by a motion to set it aside, and not by demurrer. *Webb v. Clark*, 647

40. A defendant cannot treat an amended complaint as a new suit, although it wholly change the nature of the action. His remedy, if any, is by a motion to set it aside. *Megrath v. Van Wyck*, 651.

41. Form of complaint on a promissory note by indorsee against maker, approved on demurrer. *Appleby v. Elkins*, 673

42. In a complaint under the code, asking to have dower set off and admeasured, it was held that it might be regarded as a substitute for the former petition for admeasurement, or the former bill in equity ; and thus it was no objection that the defendant, who was seized, was not in the actual possession of the lands, or that six months had not elapsed since the death of the husband. *Townsend v. Townsend*, 711

See PRACTICE, *Amendment*, 6, 7.

### 13. Confession.

43. A confession of judgment, without action, is not authorized by the code, on a demand for a trespass upon real and personal property. *Boutel v. Owens*, 655

44. A confession of judgment, out of court, by a defendant in custody, on an arrest at the suit of the plaintiff

for the cause of action confessed, made without the counsel, advice or presence of some attorney named by the defendant, and attending at his request, to inform him of the nature and effect of the confession before he signed it; is void, and the confession and judgment will be set aside on motion. *id.*

#### 14. Costs.

45. Where a plaintiff, claiming over four hundred dollars, on the proof in the cause appears to be entitled to less than two hundred dollars, and by reason of set-offs recovers less than fifty dollars, he is not entitled to the costs of the suit. *Spring Valley Shot and Lead Co. v. Jackson*, 622

46. The words "claim established at the trial," in the statute regulating costs, mean a claim so proved and established that it will entitle the plaintiff to judgment, unless it be reduced by a set-off. Establishing the claim presumptively, will not suffice, where it is defeated by counter-proof. *id.*

47. The allowance in addition to the costs, under section 263 and 264 of the code of procedure of 1848, will be what the court deem a reasonable and moderate counsel fee in the cause. *Sheldon v. Allerton*, 630

48. On appeal to the general term, from a judgment at the special term, the costs to be allowed, are those expressed in the sixth subdivision of section three hundred and seven of the code of procedure. *Smith v. Lynes*, 733

49. An appeal from a judgment of this court to the court of appeals, is a new suit, within the meaning of the code of procedure in respect of costs; and the costs recoverable on an appeal taken under the code, are to be taxed according to its provisions. *Kanouse v. Martin*, 739

50. Where such an appeal is dismissed with costs, for want of prosecution, the respondent is entitled to recover twenty-five dollars, together with his disbursements. *id.*

51. Where an appeal is dismissed with costs on motion, (the cause not having been argued on the merits, or dismissed on being called on the calendar,) the

appellant is not entitled to the fee of fifty dollars for argument prescribed by the code, nor to the term fee given for attending when the cause is not reached, the suit being dismissed at the first term. *id.*

52. Where a stipulation was given in several suits depending on the same principal point, to the effect that all should abide the event of the one first tried, and the suits were noticed for trial several terms thereafter, though notes of issue were filed in one only; it was held, that the plaintiff on recovering might tax a counsel fee for attending at those terms in each of the causes. *Minturn v. Main*, 737

53. The stipulation provided for the entry of judgment, in case of a recovery, for \$235, with interest, in one of the causes. When the judgment came to be entered, the interest made the amount over \$250. Held, that the judgment was properly entered for the entire sum, and the costs were to be taxed as upon a recovery for over \$250. *id.*

54. When a party obtains a postponement of the trial to a subsequent term on payment of costs, on the cause being moved for trial: on his omission to pay the same, the adverse party may insist on having the trial proceed; or he waive that right, and the court, on motion, will compel the moving party to pay them. *Bulkeley v. Keteltas*, 735

55. If, however, the party entitled to receive such costs, neglect to apply for an order for their payment without delay after the term; his costs of the term will abide the event of the suit. *id.*

56. In a foreclosure suit, the court will permit the plaintiff, on receiving his debt and costs, to dismiss his suit, without paying costs to junior incumbrancers, who have appeared to protect their rights. So as to the mortgagor, personally liable for the debt, who has conveyed the mortgaged premises subject to its payment. *Gallagher v. Egan*, 742

57. Where a sheriff serves with the summons, a notice of the objects of a suit for foreclosure, the plaintiff may tax for such service, as a necessary disbursement, the sum of thirty seven and

- one half cents, in addition to the sheriff's fee for serving the summons. *id.*
58. The sheriff is entitled to only one fee, of twelve one half cents, for returning a summons with his certificate of service. *id.*
59. Where in trespass, separate defences are made by several defendants, in good faith, and not for costs, each is entitled to a full bill of costs on succeeding in the suit. *Castellanos v Beauville*, 670
60. Where, after being commenced separately, the defences are united under the same attorney, or are in truth and effect united, during the residue of the suit, there can be but one set of costs for all. *id.*
61. Where in a suit against three, for the recovery of money, two suffer judgment by default, and the third defends the suit and has a verdict in his favor, he is entitled to costs against the plaintiff under section 305 of the code. *Comstock v. Bayard*, 705
62. In a proceeding supplementary to execution, no costs are given to the defendant, on his procuring the same to be dismissed without an examination. *Engle v. Bonneau*, 679
63. A plaintiff residing out of the city of New York, though within this state, must give security for costs, notwithstanding the court may issue executions against property to any county in the state. *Gardner v. Kelly*, 632.
64. This rule applied to a certiorari brought to reverse a justice's judgment. *id.*
65. The code of procedure does not repeal the revised statutes relative to security for costs. *id.*
66. A defendant who has been let in to defend, after a default and judgment, the latter standing as security, may require security for costs from a non-resident plaintiff. *id.*
67. A bond as security for costs, conditioned that the plaintiffs shall pay to the defendants the costs which he might recover in the suit, is a sufficient compliance with the statute which requires a bond conditioned to pay, on demand, all costs that may be awarded to the defendants in such suit. *Smith v. Norral*, 653
68. On a motion to set off one judgment against another, the effect of which will be to deprive the attorney of one of the parties of his costs, the court will dispose of the motion according to its views of what is right, under the circumstances. *Gihon v. Fryatt*, 638
69. Where the judgment sought to be extinguished in such a case, was for costs only, the court refused to order a set-off. *id.*
70. On an order, (in equity,) overruling a demurrer with costs, the prevailing party may under the act of 1847, tax his costs and collect the same by a precept in the nature of an execution against personal property. *Poillon v. Houghton*, 649
71. It is not necessary to enrol such an order. The taxed costs must however be filed, before such an execution can be issued. *id.*
- See PRACTICE, Appearance, 20
15. Default.
72. A court of equity will not open a default, or relieve a party from the consequences of his own neglect, in order to enable him to set up an unconscientious or a dishonest defence. *King v. Merchants' Exchange Co*, 693
73. So held, where after a decree by default for the foreclosure of a mortgage executed to secure bonds of a corporation, the consideration of which was money advanced to and used by the corporation for the purpose of its creation; the corporation sought to be let in to defend, on the ground that it had no power to execute such bonds and mortgage. *id.*
74. After judgment, a defendant will not be permitted to open the cause so as to set up that the suit has not been brought in the name of the real party in interest, provided the plaintiff have the right to receive the money recovered, and can give a valid discharge. *Grinnell v. Schmidt*, 706

16. *Demurrer.*

75. On overruling a demurrer to a complaint as frivolous, leave to answer will not be given, without an affidavit of merits. *Appleby v. Elkins*, 673
76. The plaintiff can demur to an answer, only for defects in respect of the new matter set up therein by way of avoidance. *Smith v. Greenin*, 702
77. Irrelevant or redundant matter in an answer, may be stricken out on motion, and in like manner uncertain or indefinite matter may be made more definite. *id.*
78. Immaterial matter cannot be demurred to. *id.*
79. The defendant's omission to answer an allegation of the complaint, is no ground of demurrer. *id.*

See PRACTICE, *Complaint*, 39.

17. *Discontinuance.*

See PRACTICE, *Costs*, 56.

18. *Discovery.*

80. The provision of the amended code of procedure, for the inspection and taking copies of books, papers, &c, does not repeal the provision of the revised statutes relative to the production of books and papers. *Stanton v. Delaware Mutual Ins. Co.*, 662
81. To obtain an order for a discovery under the latter, to aid in preparing an answer, the petition must show the nature of the document and its necessity for that purpose. *id.*
82. Where a discovery is sought of a paper, stated on oath to have been delivered to the adverse party; to excuse himself from discovering it, he must swear, positively, that it is not in his possession or under his control; or must state facts, which with his denial on his knowledge, information and belief, are equivalent to a positive negation on oath. *Southart v. Dwight*, 672

19. *Evidence and Witnesses.*

83. A party residing out of the state may be examined as a witness, on a commission, at the instance of the adverse party. *Brockway v. Stanton*, 640
84. A party may be examined as a witness at the instance of the adverse party, in all cases, after issue and before the trial, upon an order of a judge; without the existence of any circumstance which would authorize a commission or an examination conditionally under the revised statutes. *Partin v. Elliott*, 667
85. Such examination may be had, on five days notice requiring it, without any order of a judge; the party being subpoenaed and paid his fees as a witness. *Taggard v. Gardner*, 667
86. A stockholder in an incorporated company, is not a party to the action, nor a person for whose immediate benefit it is prosecuted, within the meaning of section 399 of the code, and is therefore a competent witness in favor of the corporation. *Washington Bank v. Palmer*, 626
87. A stockholder of a stock corporation, is a competent witness for the corporation under the recent statutes. *N. Y. and Erie R. R. Co. v. Cook*, 732
88. A co-defendant, who is primarily liable for the debt claimed, is, under the code, a competent witness for the plaintiff. *Bank of Charleston v. Emeric*, 718

See PRACTICE, *Commission*, 36 to 38.

20. *Execution.*

89. The plaintiff in a judgment, who has filed a creditor's bill, and obtained a receiver of the defendant's property, will not be permitted to levy an alias execution on personal property covered by such receivership. *Gouverneur v. Warner*, 624.
90. A levy made thereon, will be set aside on the defendant's application, unless the plaintiff will waive his receivership and dismiss his creditor's suit. *id.*
91. An execution may be returned in less

than sixty days, and whenever returned unsatisfied, the creditor may proceed under section 292 of the code, without regard to the period it was in the sheriff's hands. *Engle v. Bonneau*, 679.

92. If the debtor show any fraud or collusion in omitting to levy on property, the court will take care the fraud is not effectuated. *id.*

93. The execution must be actually returned by the sheriff, before the supplementary proceeding can be commenced. *id.*

See PRACTICE, Costs, 70, 71.

#### 21. Filing Pleadings.

94. The court will permit a plaintiff to file a reply, after the time limited in an order to file it or that the same be deemed abandoned, where the omission is explained. *Short v. May*, 639

95. So, where a copy was inadvertently filed instead of the original. *id.*

#### 22. Injunction.

96. Where a defendant moves to dissolve an injunction on his answer only, without relying upon affidavits in addition thereto; the plaintiff cannot read in opposition to the motion, his reply verified, or any affidavits other than those upon which the injunction was granted. *Hartwell v. Kingsley*, 674

97. On a motion to show cause why an injunction should not issue, the defendant may read in opposition to the motion, the affidavits of third persons, although he has put in his answer denying the whole merits of the complaint. The answer in such case is only used as an affidavit. *Florence v. Bates*, 675

98. The rule adopted in Maryland, and some other states, that on a motion to dissolve an injunction, if the equity of the case made by the bill is not denied, but new matter is set up in avoidance which is a complete defence to the action, the court cannot regard such new matter, but must continue the injunction to the hearing, has not been adopted in this state. *Semble. id.*

99. It is also contrary to the practice in England, where a defendant is entitled to a dissolution of the injunction as a matter of course, upon the allowance of a plea to the whole bill. *Semble. id.*

100. The code of procedure has not repealed or altered the provisions of the revised statutes, prescribing the security and the terms on which injunctions may issue to stay proceedings at law. *Cook v. Dickerson*, 691

101. An injunction to stay an execution, at the suit of the defendant, granted without a deposit and bond, or an order of the court dispensing with the deposit, and allowing a bond in lieu of it and a bond executed accordingly, is irregular, and will be set aside. *id.*

102. The fraud in the recovery of the judgment, which will enable the court to dispense with a deposit and bond, is such a fraud as a false statement, a substitution of one paper for another, or the like. A failure to perform a promise or condition on which the judgment was given, is not such a fraud. *id.*

103. An appeal from an order granting an injunction, does not stay the operation of the injunction; and if the defendant violate it pending the appeal, an attachment will issue against him. *Stone v. Carlan*, 736

See TRADE MARKS.

#### 23. Issues of Law.

104. Where there are issues of law and fact, and the cause is brought on for trial of the latter, the court will then determine whether it shall be tried before the issue of law is disposed of. *Warner v. Wigers*, 635

105. If tried without objection, it will be deemed to have been first tried by the order of the court. *id.*

#### 24. Judgment.

106. The prevailing party may enter judgment on the report of a referee, without any notice of the report to the adverse party, or any notice other than that of adjusting the costs by the clerk. *Renouil v. Harris*, 641



107. The attorney has nothing to do with making up the judgment roll. That is the duty of the clerk, and an irregularity, such as omitting a pleading, will not vitiate the judgment or execution. *id.*

108. The judgment roll is not irregular because it omits the case made by the referees; where there is no stay, the roll will be perfected before the case is made. If necessary, the court will order it to be annexed to the roll subsequently. *id.*

109. A party obtaining a verdict, is not bound to wait four days before entering and perfecting his judgment. *Droz v. Lakey*, 681

110. The four days mentioned in the code, after which judgment becomes final, are intended to enable the losing party to obtain a stay of proceedings, in reference to a case. *id.*

111. If he obtain an order staying proceedings within the four days, he may move to set aside the verdict as against evidence, notwithstanding the entry of the judgment. *id.*

See PRACTICE, *Confession*, 43, 44.

#### 25. Master's Sale.

112. A bid at a master's sale, its acceptance by the master, and the payment of a per centage upon the purchase money, work no change in the title, even in equity. The purchase is inchoate and defeasible until the acceptance of the title, on his part, and the confirmation of the report of sale, on the part of the court. *Strong v. Dollner*, 444

#### 26. *Ne Exeat*.

113. The writ of *ne exeat*, or equitable bail, is abolished by the code of procedure. *Fuller v. Emeric*, 626

114. Arrest and bail, as provisional remedies in civil actions of an equitable nature, can be obtained only in the cases, and in the manner, prescribed by the code. *id.*

#### 27. New Trial.

See AGREEMENT, 39.

PRACTICE, *Judgment*, 109 to 111.  
*Reference*, 125 to 129.

#### 28 Parties.

115. Section one hundred and eleven of the amended code, which requires that every action shall be prosecuted in the name of the real party in interest, is an enactment of the rule respecting parties which has always prevailed in courts of equity; and it should be applied, as far as practicable, according to the principles adopted in those courts. *Grinnell v. Schmidt*, 706

116. A factor or other mercantile agent, who contracts in his own name, on behalf of his principal, is a trustee of an express trust, within the meaning of section one hundred and thirteen of the code, and is the proper party to bring an action upon the contract. *id.*

#### 29. Proceedings Supplementary to Execution.

117. An execution may be returned in less than sixty days, and whenever returned unsatisfied, the creditor may proceed under section 292 of the code, without regard to the period it was in the sheriff's hands. *Engle v. Bonneau*, 679

118. If the debtor show any fraud or collusion in omitting to levy on property, the court will take care the fraud is not effectuated. *id.*

119. The execution must be actually returned by the sheriff, before the supplementary proceeding can be commenced. *id.*

120. No costs to a defendant on this proceeding, on his procuring it to be dismissed, without an examination. *id.*

See PRACTICE, *Attachment*, 23 to 27.

#### 30. Reference and setting aside Report.

121. In the city of New York, where



each party names a referee under the code, and those two referees name a third; the latter becomes a referee and may act without any rule or order of the court. *Renouil v. Harris*, 641

122. A defective appointment of referees, is waived by proceeding to trial before them without objection. *id.*

123. An order referring "the cause," refers the whole cause, including the issues of law and fact. *id.*

124. If the report omit any one issue, an amendment will be allowed. *id.*

125. The party deeming himself aggrieved by the report of referees, may appeal at once to the general term, from the judgment entered on the report, on the matters of law involved *Leggett v. Mott*, 720, *Haight v. Prince*, 723

126. Or, he may apply to a judge for an order staying proceedings on the report, with a view to move for a rehearing. The judge will grant a stay with or without terms, or will refuse it, as he may deem just. *id.*

127. Where a report of referees is complained of as against evidence, the party has no redress except by a motion for a rehearing. *id.*

128. If a stay of proceedings be obtained, the party must proceed to settle his case, and bring it to a hearing at the special term. *id.*

129. The court at the special term, may in its discretion, consider and determine the errors of law alleged, as well as the weight of evidence; but where matters of law alone are involved, the party complaining of the report will, in general, be required to appeal at once to the general term. *id.*

130. From the order of the judge at the special term, granting or denying the motion for a rehearing on the referees' report, an appeal may be brought to the general term, which will be heard with other calendar causes. *id.*

### 31. Service of Complaint.

131. This court will not sanction any at-

tempt by fraud or misrepresentation, to bring a party within its jurisdiction. *Carpenter v. Spooner*, 717

132. Where a party, having been induced by a false statement, to come within the jurisdiction of the court for the purpose, was served with a summons and complaint in an action in this court, the service was, on motion, set aside. *id.*

### 32. Staying Proceedings.

133. An *ex parte* order of a justice at chambers staying proceedings for more than twenty days, is null, and may be disregarded. *Huff v. Bennett*, 703

134. Where three suits were brought against a defendant, in the first of which, prosecuted in the name (with others) of the plaintiff in the second, and for the benefit of the plaintiff in the third suit, the point involved was one which would determine the right of the two plaintiffs on which they founded their claim in the second and third suits, (though it would not determine their damages;) the court ordered the two last suits to be stayed until the decision of the first, on the defendant therein, stipulating in case he failed in the first, to contest in the two last only the question of damages. *McFarlan v. Clark*, 699

135. A notice of the entry of the judgment, given to foreclose an appeal, is a proceeding in the cause, within the meaning of an order staying proceedings on the judgment; and will be set aside as irregular. *Bagley v. Smith*, 651

See PRACTICE, *Judgment*, 109 to 111.  
*Reference*, 126 to 128.

### 33. Striking out frivolous or redundant matter.

136. A motion to strike irrelevant or redundant matter out of a pleading, will not be granted, where the party before moving, answers or replies to such pleading. *Corlies v. Delaplaine*, 680

137. If there be any reasonable doubt whether the matter complained of be pertinent, the court will not strike it

out, but will put the party to his demurrer. *Anon.* 682

138. Irrelevant or redundant matter in an answer, may be stricken out on motion, and in like manner uncertain or indefinite matter may be made more definite. *Smith v. Greenin*, 702

139. Immaterial matter cannot be demurred to. *id.*

### 34. Trial.

140. The finding of a judge on an issue of fact tried by him, under the Judiciary Act of 1847, a jury being waived, is entitled, on a motion for a new trial, to the same consideration as the verdict of a jury. *Oakley v. Aspinwall*, 7

141. Trial of an equity suit before a jury under the code, where the defendants rights were distinct, &c. *Wood v. Harrison*, 655

See PRACTICE, *Costs*, 54, 55.  
*Issues of Law*, 104, 105.

### 35. Warrant against Fraudulent Debtors.

42. Under the act to abolish imprisonment for debt, a warrant for the arrest of the defendant, issued before the service of the summons by which the suit is commenced, is void. *Lee v. Averill*, 621

143. On discharging a party arrested under such a warrant, the judge cannot impose as terms, that he shall not bring an action. *id.*

See JURISDICTION, 3, 4.

### PRINCIPAL AND AGENT.

1. Where an agent, entrusted with a negotiable note for the purpose of procuring it to be discounted, pledged it with a stranger for money loaned to him for his own use, at usurious interest; *Held*, that the transaction being illegal, for usury, the lender could not retain the note against the true owner on the ground that he had received the

same in good faith, in the usual course of trade. *Keutgen v. Parks*, 60

2. Held also, that the disposal of the note by the agent, was tortious. *id.*

3. The agent in such a case, is a competent witness for his principal in an action brought against the stranger for the recovery of the note. *id.*

4. The record of the principal's recovery, will not be evidence for the agent in a subsequent suit; nor will he be liable to the principal for the costs, if the suit be unsuccessful. His interest is balanced, and the usury in the loan to him, does not alter the case. *id.*

5. Where a party who received a note, on a tortious misappropriation by an agent, but without notice of the owner's rights, sold it, and received the proceeds; and the owner subsequently demanded the note of him without effect; it was *held* to be sufficient evidence of a conversion. *id.*

6. An agent on receiving sundry notes to procure them to be discounted, furnished his post dated checks to his principal, intending to meet them with the proceeds of the notes when discounted. Before the date of the checks arrived, he pledged the notes for his own use; and the checks were not paid. He subsequently paid the principal, a small sum, on account. In an action by the principal against the pledgee, for one of the notes; *held*, that the agent, on tortiously disposing of the notes, extinguished any lien he may have had for his checks, and that no lien therefore passed to the pledgee; and that the pledgee had no lien upon the note for the payment made by the agent. *id.*

7. A general clerk of a merchant, who transacts the out-door business of the latter, negotiates purchases and charter parties in the name of and ratified by his principal, and prepares and presents bills of lading for signature on shipping property of the principal; has no authority as such clerk, or as commercial agent, to pledge such bills of lading, or to receive advances on the faith thereof. *Zachrisson v. Akman*, 68

8. Such a chief clerk is in no sense a factor, nor is he entrusted with the pos-

session of bills of lading, within the factor's act of 1830. That statute was intended to protect advances and dealings made on the faith of the ownership of the property, and not on the faith of the possession of the paper title, or the evidences of title. *id.*

9. Under the section of the revised statutes forbidding any person to charge more than half of one per cent. for brokerage, soliciting or procuring the loan or forbearance of money, the broker or other person negotiating a loan, is entitled to only one half of one per cent., whether the loan be for a year, or for a term of years. *Corp v. Brown*, 293

10. Where a draft, after having been protested for non-payment, is paid to the agent of the holder, by a third person, for the honor of the drawer, without his having seen the draft, but upon the representation of such agent that he has a genuine draft, and the draft afterwards turns out to be a forgery; the person paying it supra protest, may, after having given immediate notice of the forgery, recover back the amount paid by him, in an action against the agent, brought before such agent has paid over the money to his principal, and before his situation in respect to his principal has been in any manner changed. *Goddard v. Merchants' Bank*, 247

11. What will be considered due diligence, on the part of a person paying a forged draft, supra protest, in giving notice of the forgery. *id.*

12. An agent's merely passing money in account, giving credit, or making a rest, is not equivalent to paying the money over to his principal. *id.*

13. Where an agent collects a negotiable draft as indorsee, without disclosing his agency to the drawer, he will be liable to refund the money to the drawer, on its appearing that it was paid on a fictitious indorsement, although the agent has, in the meantime, remitted the proceeds to his principal. *Merchants Bank v. McIntyre*, 431

See SALE, 14.

## PRINCIPAL AND SURETY.

1. As between the drawer and acceptor of bills of exchange, the presumption of law that the acceptor is primarily liable for their payment, is not overthrown by evidence that they were accepted in respect of consignments of property; it not being shown that the proceeds were insufficient ultimately to meet the bills. *Mottram v. Mills*, 189

2. Such bills are not in any sense accommodation paper; and the drawer stands in the place of a surety for the acceptor. *id.*

3. Where the holders of such bills, over due, agreed with the acceptors, that if they would transfer to a trustee all the consigned property, the holders would not hold the acceptors liable upon such bills beyond a specified sum, less than the entire amount, and the acceptors transferred the property accordingly; it was held, that the drawer was thereby discharged. *id.*

4. In general, the holder's giving time to the acceptor or discharging him, will be a discharge to the drawer. *id.*

## PRODUCTION OF BOOKS, &c.

See PRACTICE, *Discovery*.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c.

## PROPERTY.

See OFFICER, 6 to 9.  
SALE, 31 to 33.

## R

## RECORDING ACTS.

1. The provision of the act that unrecorded deeds shall be void against bona fide purchasers, &c., is intended for the protection of purchasers against previous grants of those under whom they derive title. It has no applica-

tion to a purchaser who derives his title from one claiming in hostility to all of the parties in the unrecorded deed. *Embury v. Conner*, 98

2. The plaintiff was the grantee of premises occupied by the defendants, at the time of his purchase, under a lease from the grantor. The deed to the plaintiff was subject to a mortgage upon the premises, and was unrecorded. The defendants had attorned to the plaintiff, and paid rent to him. Subsequently, the mortgage was foreclosed, but the plaintiff was not made a party to the suit. The premises were sold by a master, on the 7th of April, and bid off by M., under whom the defendants claimed; but M. did not pay the purchase money, until the 5th of May, when he took a deed from the master, and had it recorded. In an action by the plaintiff to recover the rent due on the 1st of May next after the sale; Held, that his claim to the rent was unaffected by the foreclosure proceedings, and that his title remained valid until it was divested by the recording of the master's deed. *Strong v. Dollner*, 444

3. Held also, that the recording of the master's deed had no relation back to the time of the sale, so as to divest rights of action previously accrued to the plaintiff by virtue of his unrecorded deed. *id.*

4. Although the recording act makes an unrecorded conveyance void as against a subsequent purchaser in good faith, for value, whose deed is recorded first, it does not avoid the former as of a time prior to the execution of the latter. It does not transfer to such subsequent purchaser rights in respect of the property, against third persons, which were vested in the owner holding under the unrecorded deed, prior to the execution of the subsequent conveyance. *id.*

#### RECOUPMENT.

See LANDLORD and TENANT, 1, 2.  
SALE, 24, 27.

#### REFERENCE.

See PRACTICE, Reference, &c.

#### RE-HEARING.

See PRACTICE, Reference, &c.

#### RELEASE.

See COMPROMISE.

#### RENT.

See LANDLORD and TENANT.

#### REPLEVIN.

1. Replevin in the *detinet*, may be brought when the taking was tortious; and that form of action does not admit the original possession of the defendant to have been lawful. *Zachrisson v. Ahman*, 68
2. Where one claiming the right to bales of cotton on board a ship, for which bills of lading have been signed, demands the bills of lading, it is a sufficient demand of the cotton which they represent. *id.*

#### S

#### SALARY.

See OFFICER, 3 to 11.

#### SALE.

1. On a sale of cotton by a written contract, deliverable in thirty days, the buyers were to pay storage, insurance, and interest after ten days, and were to deposit with the sellers five dollars per bale. Before the thirty days expired, and before any delivery, or further act to pass the title to the buyers, the cotton was destroyed by fire. When it was burnt, and at the end of the thirty days, the value of cotton in the market, was much below the contract price. In a suit by the buyers to recover back the deposit; held, that the true construction and meaning of the contract, was that the deposit was to secure the seller against loss by means of a fall in the price of the cotton, as well as to con-

- stitute a part payment on the contract, and that although the title did not pass, the purchaser was entitled to retain the deposit, to make up the deficiency in the contract price, left after the application of the insurance money, which covered the value of the cotton at the time of its destruction. *Joyce v. Adams*, 1
2. On a sale of goods by sample, there is an implied warranty that the bulk of the goods is equal to the sample in quality and soundness. *Beirne v. Dord*, 89
3. This is an exception to the principle of *caveat emptor*, which is the governing rule as to sales in general. *id.*
4. In order to warrant a jury in finding that a sale was a sale by sample, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both seller and buyer mutually understood they were dealing with the sample, and with an understanding that the bulk was like it. *id.*
5. An opportunity for a personal examination of the bulk, is a strong circumstance against considering the sale to have been made by sample. *id.*
6. A general and uniform usage in a particular trade, in goods so packed or situated that examination of the bulk is inconvenient and difficult or calculated to expose the goods to injury, to the effect that the goods in that trade are sold by the production and examination of samples; is competent in connection with other evidence, to prove in respect of a sale of such goods, that a personal examination of the bulk was not contemplated by either party, and that both intended to contract upon the sample only. *id.*
7. Such usage is not admissible to prove the contract of itself, or as of itself forming a part of the contract. *id.*
8. And it is not made out by proof of a custom to exhibit a specimen, but it must go to the extent of a mutual understanding that the bulk should be like the specimen in all respects. *id.*
9. Proof that a like usage prevails in respect of all goods sold in bales, boxes and original packages, is not admissible to repel or destroy the force of a usage proved in respect of the particular article in question at the trial. *id.*
10. Evidence of allowances made in conformity to the usage set up, on sales made by exhibiting samples, is proper to establish such usage. *id.*
11. A usage of trade, to the effect that on a contract to deliver flour of a particular mark or brand, a delivery of flour of equal or better quality, of a different mark or brand, will satisfy the contract; was, held to be inadmissible. *Beals v. Terry*, 127
12. On the default of the vendor in a contract to sell and deliver goods at a specified time, for a price then payable, the measure of damages in an action by the vendee, is the difference between the contract price, and the market value at that time, with interest on such difference. *id.*
13. The same rule applies against a guarantor of the vendor's fulfilment of the contract. *id.*
14. Where the bought and sold notes delivered by a broker to the respective parties, on a sale of produce, differ in a material point, no contract is effected between the parties. *Suydam v. Clark*, 133
15. So held, where on a sale of one thousand barrels of flour, the bought note expressed that seven hundred and fifty barrels were to be delivered when it arrived, not later than three days; and the sold note expressed that the whole was to be so delivered. *id.*
16. Where flour was deliverable upon a day certain, the delivery of an order on a barge, in the hold of which the flour is deposited, is not a compliance with the contract; there being no actual delivery or tender of delivery of the flour itself, on the day specified. *id.*
17. Evidence of a custom or usage of trade, that the delivery of an order for flour by the seller to the buyer, the receipt thereof by him, and his presentation to the drawee of it, the seller not being notified of the non-acceptance of the order, is a delivery of the

- flour sold; *held*, to be inadmissible. *id*
18. On a sale on a credit, to be secured by notes as collateral, not yet due, the receipt of the collaterals five days after the delivery of the goods, makes the seller a *bona fide* holder of the notes for a valuable consideration, so as to protect him against any defence which the maker of the notes had against the buyer of the goods. *Fenby v. Pritchard*, 151
19. This was *held*, although at the time of the sale, the notes in question were not specified or described, and were not in fact then in the possession of the buyer. *id*.
20. Where a sale of goods is made on an agreement that the price shall be applied to the payment of a precedent debt, such price must be actually applied by a receipt or otherwise, to bring it within the exception in the statute of frauds, founded on payment of all or part of the price. *Clark v. Tucker*, 157
21. In order to constitute an acceptance and receipt of the goods, to take a sale out of the statute, there must be an act of delivery on the part of the seller, as well as an act of acceptance by the buyer. *id*.
22. Where goods in the possession of a factor, were sold by a parol agreement, and a constructive delivery was set up, first by a letter at the time from the buyer's agent to the factor; and second, by a letter a fortnight afterwards, by the seller to the factor; it was *held*, that the sale was void, because the seller did not participate in the act of delivery sought to be inferred from the first letter, and because the buyer did not accept and receive in connection with the second. *Held* also, that the second letter was too late; and that an act of delivery by notice to the factor, must be concurrent, or substantially at the same time that the contract is made. *id*.
23. A contract to sell and deliver cider at a future time, which the seller is to procure from farmers and refine to fit it for market, is a contract for the sale of goods; and if by parol, is within the statute of frauds. *Seymour v. Davis*, 239
24. Where a parol contract was made for the delivery of five hundred barrels of cider, in parcels at future periods, each to be paid for in a note on delivery, and several parcels were delivered from time to time, and all paid for except the last; in an action for the last, it was *held*,
1. That the delivery and acceptance of each parcel, made a several and distinct contract of sale of such parcel; upon each of which successively, each party had all the actions and remedies incident to a sale. Each shipment must be regarded as a sale by itself of the quantity accepted, independent of the original void agreement.
  2. That the shipments and deliveries so made, though in consequence of the void agreement, cannot be regarded as one transaction, so as to entitle the buyer to recoup against the price of the parcel last received, his damages by reason of defects in the previous parcels.
  3. The part performance of a void contract for the sale of goods, does not take it out of the statute of frauds, even in respect of the portion performed. Acts of delivery and acceptance under such a contract, establish a new contract of sale, in which more or less of the terms of the void agreement may be expressly or impliedly embodied; but each delivery and acceptance make a distinct contract. *id*.
25. Where goods are sold "to arrive" by a specified ship, the contract is conditional; and if they do not arrive, the contract is at an end. *Shields v. Pettee*. (*Affirmed in the Court of Appeals*.) 262
26. So where a sale was made of pig iron No. 1, on board the *Siddons*, which vessel was then at sea on her way to this port; and she arrived with pig iron consigned to the seller, but which was not No. 1; it was *held*, that it was a *sale to arrive*, and the article never having arrived, neither party was bound by the contract. *id*.
27. On a sale of goods, if the buyer on receiving a part of the quantity sold, find they are not of [the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue,

retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages, if he refuse to return the part delivered. *id.*

28. Where the plaintiffs, upon a sale of goods to the defendants, were induced to take the note of a third party in payment, upon the representation of one of the defendants that it was good, when in fact, the defendants knew the makers were insolvent, and the note worthless; *Held*, that the defendants were liable to the plaintiffs, either in an action of assumpsit to recover the value of the goods sold, or in an action on the case to recover damages for the deceit practised upon them. *Hawkins v. Appleby*, 421

29. Where goods are obtained for the use of a firm, by means of the fraud of one of its members, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act of the one who obtained them, and will be placed in the same situation, in reference to the rights of the vendors of the goods, as if he had directed his partner to procure the property, or had concurred with him in the transaction. *id.*

30. And where a partner, on being notified of a fraud committed by his co-partner, and that the firm will be held liable therefor, omits to repudiate or disaffirm what has been done by his co-partner, he will be held to have adopted and ratified the fraud, and will, from thenceforth, be deemed a joint wrong-doer. *id.*

31. A sale and delivery of property on condition that the title shall not pass to the purchaser until the purchase-money is paid, and reserving to the vendor the right to take possession of the property, in case of non payment, is a valid contract; and until the purchase money is paid, the vendor's title will not be divested. *Herring v. Willard*, 418

32. Such an arrangement is, in effect, a letting of the property to the purchaser, to be reclaimed if the price fixed upon is not paid; and is not like the case of property placed in the hands of

one who keeps similar articles for sale. *id.*

33. The general principle is, that the title of the real owner must prevail in such cases. *id.*

### SALVAGE.

See JURISDICTION, 1 to 3.

### SET OFF.

1. In an action to recover of a stakeholder money staked with him by the plaintiff, on a wager upon the event of a horse race, the defendant cannot set off the amount of a deposit made by him with the plaintiff, upon another wager of a similar character. *Bevins v. Reed*, 436

2. The statute having declared wagers unlawful, and every contract respecting them void, the sole remedy of a party depositing money upon a wager is by a suit, under the statute, to recover back the money deposited. He cannot recover it without suing for it, by way of a defence or set off in a suit brought against him. *id.*

3. There is no indebtedness, in such a case, from the stakeholder to the depositor. *id.*

4. There is merely a right, on the part of the latter, to sue the former, in accordance with a strict statutory grant of relief where no other remedy exists. *id.*

5. Aside from the language of the statute, giving to a party depositing money upon a wager a remedy by suit against the stakeholder, his right to recover back the amount of his deposit is not a demand which can be set off; it not being a demand arising upon judgment, or upon contract, express or implied. *id.*

See PRACTICE, *Costs*, 45, 46, 68, 69.

### SHERIFF.

See JUDGMENT AND EXECUTION, 4, 5.  
PRACTICE, *Costs*, 57, 58.



## SHIPS AND SHIPPING.

1. The question of sea-worthiness, is a matter of fact to be decided by the jury on the evidence. *Sherwood v. Rugles*, 55
2. There is no legal presumption that a vessel is unseaworthy, from the fact of her leaking within a few hours after her sailing, there being no unusual stress of weather. *id.*
3. The owners of a vessel have a lien upon the cargo, for the proper proportion of the general average, on an injury to the vessel by the perils of the sea. *id.*
4. The owners remedy against the consignee, is not lost by the latter's receiving the cargo at the port of necessity and forwarding it himself to its destination. *id.*
5. If after a vessel is disabled, the master can in a reasonable time, communicate with his owners, it is his duty to do so, before making repairs; and such delay does not relieve the owner of the cargo from contribution. *id.*
6. It is for the jury to say, upon all the circumstances, whether the delay in order to communicate be reasonable. *id.*
7. The charterer of a vessel cannot withhold goods for which the master has signed bills of lading to third parties, against *bona fide* assignees of such bills for value, on the ground that the property was his own, and the bills should have been signed to him. *Zachrisson v. Ahman*, 68
- 8 A general clerk of a merchant, who transacts the out-door business of the latter, negotiates purchases and charter parties in the name of and ratified by his principal, and prepares and presents bills of lading for signature on shipping property of the principal; has no authority as such a clerk, or as commercial agent, to pledge such bills of lading, or to receive advances on the faith thereof. *id.*
9. Such a chief clerk is in no sense a factor, nor is he entrusted with the possession of bills of lading, within the factor's act of 1830. That statute

was intended to protect advances and dealings made on the faith of the ownership of the property, and not on the faith of the possession of the paper title, or the evidences of title. *id.*

## SHIPS AND VESSELS.

1. Where a vessel departs from a port at which a debt has been contracted on her account, for repairs, etc., in pursuit of some trade or business, it is a departure within the meaning of the statute relative to proceedings for the collection of demands against ships and vessels. *Rockefeller v. Thompson*, 395
2. Where a steamboat was regularly employed in transporting passengers on the Hudson river between New York and Albany: *held*, that in contemplation of law, she was engaged in making coasting voyages; that every trip of the boat was a departure within the meaning of the statute, and that a claim or debt for work, labor and materials furnished such boat in the port of New York, ceased to be a lien upon the boat at the expiration of twelve days from the time of her departure from that port. *id.*
3. And where repairs were made by the plaintiffs upon a vessel at various times during a period of several months, in pursuance of general orders to them to do whatever work they should from time to time be directed by the officers of the vessel to do: *held*, that the contract was not an entire and indivisible one, but that each job of work done constituted a separate debt, which might be enforced by the plaintiffs. *id.*

## SLANDER.

See LIBEL.

## SLANDER OF TITLE.

1. In an action for slander of title, the truth of the words may be given in evidence under the general issue. *Kendall v. Stone*, 269
2. Three things are necessary to maintain an action for slander of title.—The words spoken must be false; they



- must work an injury to the plaintiff in respect to his title ; and they must be malicious ; not malicious in the worst sense, but with intent to injure the plaintiff. *id.*
3. A person who utters words in the *bona fide* assertion and maintenance of his own title, is regarded as standing in a more favorable position, in an action for slander of title, than he who attacks the title of another without such cause, *it seems.* *id.*
4. In an action for slander of title, it is proper for the judge to charge the jury that the question for them to determine is, whether the defendant made the statements respecting the plaintiff's title *bona fide*, and under an honest impression of their being true ; or whether he made them maliciously, and for the purpose of slandering the plaintiff's title ; and that the question whether the words were spoken maliciously or *bona fide*, depends very much upon their truth or falsity, and the circumstances under which they were spoken ; whether honestly, to caution purchasers, or to alarm them with unfounded charges. *id.*
5. Where the evidence proves the speaking of words by the defendant, derogatory to the plaintiff's title, and that the person to whom they were spoken forebore, in consequence thereof, to complete a contemplated purchase of the property from the plaintiff, sufficient words, and a consequence from them sufficiently detrimental to the plaintiff, are shown to sustain an action ; provided *malice* in the defendant be also established. *id.*
6. Malice, in such an action, is a question of fact, and should be submitted to the jury. *id.*
7. Proof of conversations of the defendant, other than those laid in the declaration, respecting the same title and subject, are admissible for the purpose of proving the *malice* of the defendant. *id.*
8. Though a witness can only testify to such facts as are within his own knowledge and recollection, yet he may refresh his memory by the use of a written memorandum. But where the witness neither recollects the fact, nor

remembers to have recognized the written statement as true, and the memorandum was not made by him, his testimony, so far as it is founded on the memorandum, is but hearsay. *id.*

9. In actions of tort, the jury are the proper judges of the weight and effect of the evidence ; and the court will not interfere with the damages found by them, unless they appear to be grossly disproportionate to the injury sustained. *id.*
10. In an action for slander of title, the judge is justifiable in charging the jury that they may give exemplary damages ; and in refusing to charge that they can only give compensatory, as distinguished from exemplary, damages. *id.*

### STATUTE.

See CONSTITUTIONAL LAW, 1 to 14.  
HUSBAND AND WIFE, 4 to 8.

### STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

### STATUTE OF LIMITATIONS.

See LIMITATIONS.

### STATUTE TIME.

See TIME.

### STOCK.

See CORPORATION, 1 to 7.

### SUPERVISORS.

1. A claim for services rendered as counsel for the board of supervisors of a county, and its various committees, is a *county charge*. *Brady v. Supervisors of New York*, 460
2. No action for the recovery of a county charge, can be maintained against a county, or the board of supervisors. *id.*

3. Suits against a county can be brought only for such causes of action or controversies, as cannot be settled and adjusted by the board of supervisors, in the exercise of their ordinary powers, such as torts, malseasances of county officers, and the like. *id.*

4. The supervisors of a county, as such, or as a board, are not a body corporate, and possess no powers as a corporation. The corporation is the county. *id.*

### SUPREME COURT.

5. The superior court, as now constituted, is co-ordinate with the supreme court. The decisions of the latter are not authoritative, although to be treated with great deference and respect. *Ford v. Bubcock*, 518

### SURROGATE COURT.

See BOND, 1 to 4.  
JUDGMENT, &c., 12.

## T

### TAXES.

See CONSTITUTIONAL LAW, 13.  
HEREDITAMENTS, 3, 4.

### TIME, COMPUTATION OF.

1. The statute permitted a non-resident plaintiff to sue in a justice's court, by a short summons, having not less than two nor more than four days to run. He could also sue by the ordinary summons, having not less than six nor more than twelve days to run. Such a plaintiff sued by a summons returnable five days from its date. *Held*, that the justice had no jurisdiction to proceed in the suit. *King v. Dowdall*, 131

2. Where Sunday is an intervening day, it is counted in computing statute time. *id.*

### TITLE TO PERSONAL PROPERTY.

See SALE, 31 to 33.

### TRADE MARKS.

1. Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior repute as his may be the means of gaining. *Amoskeag Manufacturing Co. v. Spear*, 599

2. He is entitled to the protection of the law, in the exclusive use of the trade-mark thus appropriated by him. The public interests, as well as his own, require this. *id.*

3. One who affixes to his own goods a copy or imitation of the trade-mark of another, commits a fraud upon the public and upon the owner of such mark. As to the latter, there is a damage which may be such as not to admit of compensation. *id.*

4. Equity will restrain the wrong doer by injunction, upon the grounds of protecting the owner in the exercise of a legal right, the suppression of fraud and the prevention of irreparable mischief. *id.*

5. An injunction will be granted with great caution, and not where the legal right is disputed and doubtful, nor so as to create or risk the creation of a monopoly. *id.*

6. The wrong in these cases, consists in the sale of the goods of the fabric of one person, as being those made by another; and it is only to the extent in which the false representation is directly or indirectly made, that an injunction ought to be granted. *id.*

7. The imitation may be complete, or may be limited or partial. In the latter event, though the proprietor's name may be omitted, and the imitator's substituted, yet if the peculiar devices or symbols be so copied as to manifest a design to mislead the public, and will probably produce that effect, an injunction will be granted. *id.*

8. There is no exclusive right in the use of marks, symbols or letters, which merely indicate the appropriate name,

mode or process of manufacture, or the peculiar or relative quality of the fabric manufactured, as distinguished from those marks which indicate the time, origin or ownership of the fabric. *id.*

9. Thus, where the letters "A C A" were used by a manufacturer of tickings, as designating the first quality of his fabrics, and the same letters were subsequently used by another manufacturer of the same article for the same purpose, it was *held*, that the latter could not be restrained from so using the letters. *id.*

10. An acquiescence by the owner of a trade-mark, in its use by another, is revocable and confers no right after the license is withdrawn. *id.*

### TRESPASS.

1. Whether the taking out of a foreign attachment, (naming a garnishee,) giving bail therefor, and prosecuting it after service; will make the attaching creditor liable in trespass or trover, for goods in the hands of the garnishee, whom the sheriff has summoned, leaving the goods in his possession; there being no direction by the creditor to levy on any specified goods? *Quere Clark v. Tucker*, 157
2. Where a collector, by virtue of an assessment warrant, levied upon the goods of a person not named in the warrant nor liable to pay the assessment, threatened to remove the goods, and gave him notice he would sell on a day specified, if he did not previously pay; it was *held*, that payment made when the collector was about to remove the goods for sale, was not voluntarily made, and that the collector was liable in trespass. *Wetmore v. Campbell*, 341

See PRACTICE, *Bail*, 28, 29.  
TROVER, 1.

### TRIAL.

See PRACTICE, 54, 55, 104, 105, 140, 141.

### [TROVER.

1. Where an agent, entrusted with a negotiable note for the purpose of procu-

ring it to be discounted, pledged it with a stranger for money loaned to him for his own use, at usurious interest; *Held*, that the transaction being illegal, for usury, the lender could not retain the note against the true owner, on the ground that he had received the same in *good faith*, in the usual course of trade. *Keutgen v. Parks*, 60

2. Replevin in the *detinet* may be brought when the taking was tortious; and that form of action does not admit the original possession of the defendant to have been lawful. *Zachrisson v. Ahman*, 68
3. Where one claiming the right to bales of cotton on board a ship, for which bills of lading have been signed, demands the bills of lading, it is a sufficient demand of the cotton which they represent. *id.*

See TRESPASS, 1, 2.

### TRUST AND TRUSTEE.

1. Every trustee of real estate is presumed to take as large an estate as is necessary for the purpose of the trust, and no more. *Norton v. Norton*, 296
2. Where before the revised statutes, a husband conveyed to a trustee his title to his wife's land, in trust to dispose of it for her, and to manage it and collect the rents for her benefit; it was *held*, that the trustee took an estate for the wife's life only, with a power in trust to dispose of the husband's life interest; and the power not having been executed, the trust ceased on the wife's death, leaving the husband surviving. *id.*
3. If the deed had conveyed to the trustee the whole life estate of the husband, the wife's interest being a mere equitable estate for the life of another, on her death it would go to her administrator, and to her husband as entitled to her personal property subject to her debts; and the trust, if outstanding, would thereupon, by the revised statutes, be converted into a legal estate. *id.*
4. A woman, in contemplation of marriage, by deed dated previous to the act for the more effectual protection of the property of married women,

conveyed her estate, real and personal, to a trustee, in fee and absolutely, reserving to herself only the entire control of the income for her separate use for life, the direction of the investment and re-investment of the capital by the trustee, the power to dispose of the whole by an instrument in the nature of a will, and the full restoration of the property if she survived her intended husband. And the trust-deed provided, that in case of the decease of the grantor without making any appointment, the trustee should pay over and transfer the trust estate "*to such person or persons as would be her legal representatives by the statute, for the distribution of intestates estates.*" *Held*, that a complaint by the grantor, subsequent to the marriage, and during the life of her husband, brought for the purpose of having the marriage settlement set aside, and the capital of the estate given to her as she held and owned it previous to the date of the conveyance, could not be sustained; the infant children of the plaintiff having a contingent future estate in the property, which the court could not divest. *Watson v. Bonney*, 405

5. *Held also*, that if the property had been limited over to the "legal representatives" of the grantor, simply, the husband would, at his wife's death, have taken the property either beneficially, or officially, as her personal representative; but that the addition of the words "by the statute of distributions," changed the devolution totally, and carried it to the next of kin, to the exclusion of the husband. *id.*

6. *Held, further*, that the rights and interests of the parties, under the trust-deed, were not in any wise affected by the provisions of the act of 1848, "for the more effectual protection of the property of married women."—And that the rule would be the same, even upon the assumption that the children of the plaintiff had no rights, under the settlement. *id.*

7. The object of that act was not to enable married women to destroy their marriage settlement, by which their property had already been effectually protected for the benefit of themselves and their children. *id.*

8. The statute does not profess to interfere with existing contracts, and the court cannot give it a retrospective action by intendment. If it had, in terms, been made applicable to executed settlements, and had divested the estates of the trustees, it would have been utterly nugatory and unconstitutional. *id.*

9. In 1843, R., owing a large sum to S. and V., secured by bonds to them severally, payable in several successive years, conveyed certain real estate and land shares to trustees, in trust to manage and sell the same as they might deem best, and apply the proceeds towards payment of the bonds and interest as they fell due. In case of a default in payment of any of the bonds, or the annual interest, the trustees, on the written request of either of the creditors, were to sell so much of the premises conveyed, at auction, on ten days notice, as would pay the amount actually due. The land shares were to be first sold, and then the lands. The surplus was to be paid over and conveyed to R. In 1846, R. executed to the trustees, with the concurrence of the creditors, a release of his residuary interest, and procured a conveyance of certain outstanding interests to them; upon which the creditors released R.'s personal liability on the bonds. The agreement thereupon executed by all the parties, provided that all the property should be offered for sale by the trustees, on reasonable notice, unless a division without sale were agreed upon without unnecessary delay. In the event of any of the parties not consenting, then a sale was to be made, under the trust deed of 1843, upon the requisition of the other parties, for the payment of the bonds held by them which were then due. The parties did not agree upon a division of the property.

*Held*, 1. That if by the transactions in October, 1846, the creditors became vested as tenants in common, with all the lands conveyed in trust in 1843, and the estate of the trustees under that conveyance, ceased; the power to sell the lands was nevertheless continued.

2. In that view, the power conferred on the trustees, by the instruments of October, 1846, being granted by the owners of lands to be exercised for their sole benefit, was therefore not a

power in trust. It was "a simple power of attorney to convey lands in the name and for the benefit of the owner."

3. That the power to sell was not revocable by either one of the constituents, without the consent of all.—The right to demand a sale was conferred on each, in consideration of his releasing R. *Selden v. Vermilya*, 568

10. *Held*, further, that the effect of the instrument of October, 1846, was merely to vary and modify that of 1843, and that the lands after October, 1846, were held under a valid, express trust to sell lands for the benefit of creditors. That the power of sale extended to the liquidation of the bonds of R. then due and payable; and for the rateable benefit of all such bonds, without preference. *id.*

11. A partition cannot be made of land which an attorney is authorized by an irrevocable power from the tenants in common, to sell for the benefit of all the owners; without the consent of all to such partition. *id.*

12. So of lands conveyed to a trustee where each is entitled to require a sale of the whole for the benefit of creditors, even after the residuary interest has been extinguished. *id.*

13. The assets of a decedent at the time of his death, were in the hands of one who claimed as sole legatee, and so continued. The wife of the deceased, (whose relation as wife was contested,) opposed the probate of his will, and succeeded before the surrogate and on two appeals. Pending a third appeal, she compromised and settled the controversy, by receiving all her costs and charges, and a sum in gross, less by about one-fourth than her share of the estate. The amount of the estate was in fact, about one-fourth larger than she was aware of when she settled. In a suit by her to set aside the compromise, *Held*, 1st. That it was not to be treated as one made between trustee and beneficiary, or between parties standing in a confidential relation to each other. 2nd. That she was not entitled to relief on any ground, it being quite apparent that she would have settled in the same manner if she had

known the amount of the estate. *Currie v. Steele*, 542

See PARTNERSHIP, 8, 9.

PRACTICE, *Parties*, 115, 116.

## U

### USAGE.

1. A general and uniform usage in a particular trade, in goods so packed or situated that examination of the bulk is inconvenient and difficult, or calculated to expose the goods to injury, to the effect that the goods in that trade are sold by the production and examination of samples; is competent in connection with other evidence, to prove in respect of a sale of such goods, that a personal examination of the bulk was not contemplated by either party, and that both intended to contract upon the sample only. *Beirne v. Dord*, 89

2. Such usage is not admissible to prove the contract of itself, or as of itself forming a part of the contract. *id.*

3. And it is not made out by proof of a custom to exhibit a specimen, but it must go to the extent of a mutual understanding that the bulk should be like the specimen in all respects. *id.*

4. Proof that a like usage prevails in respect of all goods sold in bales, boxes, and original packages, is not admissible to repel or destroy the force of a usage proved in respect of the particular article in question at the trial. *id.*

5. Evidence of allowances made in conformity to the usage set up, on sales made by exhibiting samples, is proper to establish such usage. *id.*

6. A usage of trade, to the effect that on a contract to deliver flour of a particular mark or brand, a delivery of flour of equal or better quality, of a different mark or brand, will satisfy the contract; was held to be inadmissible. *Beals v. Terry*, 127

7. Evidence of a custom or usage of trade, that the delivery of an order for flour by the seller to the buyer, the receipt thereof by him, and his presentation of it to the drawee, the seller not being notified of the non-acceptance of the order, is a delivery of the flour sold ; held, to be inadmissible. *Suydam v. Clark*, 133
8. On the construction of a policy of insurance against fire, effected on a ship builder's stock of ship timber, "contained in the yard bounded by" three specified streets and the river, (in the city of New York,) proof was received to the effect that it was usual for the owners of ship yards in that city, to keep their stock of timber on the side walks, and in the streets in the vicinity of their yards, as much so as within the yards. Some of the timber of the insured, lay across the side walks, partly in the street and partly on the land of the insured, which was only partially fenced. *Held*, that the evidence was properly received, to show what was the meaning of the terms "stock of ship timber in a ship yard," as used by the parties in the policy, and to define the term, yard of a ship builder. And there being no contradictory testimony, *held*, that the insured was entitled to recover for the loss of his timber, situated in the streets adjacent to his land. *Webb v. National Fire Ins. Co.*, 497

### USURY.

1. The possession of an usurious note by the indorsee, is presumptive evidence that he received it before it became due, for a valuable consideration, without notice of the usury. *Smedberg v. Simpson*, 85
2. Where a new security is given to such a *bona fide* holder of an usurious note, by one of the parties thereto, after it became due ; it was *held* to be valid, notwithstanding the holder of the usurious note was apprised of the usury therein, after he became its holder, and before the new security was given. *id.*

See **BILLS OF EXCHANGE**, 42.

## V

### VOID CONTRACTS.

See **AGREEMENT**, 35 to 38.  
**BANKRUPT**, 1, 2.

### VOLUNTARY CONVEYANCE

See **CREDITOR'S SUIT**, 3 to 5.

### VOLUNTARY PAYMENT.

See **AGREEMENT**, 22 to 25.  
**PAYMENT**, 3 to 5.  
**TRESPASS**, 2.

## W

### WAGERS.

See **SET-OFF**, 1 to 5.

### WARRANT.

See **MUNICIPAL CORPORATION**, 34 to 39.  
**PRACTICE, Warrant, &c.**, 142, 143.

### WARRANTY.

See **SALE**, 2 to 6.

### WHARFAGE.

See **HEREDITAMENTS**.  
**MUNICIPAL CORPORATION**, 7, 8.

## WILL.

1. Where a testator, by his will, after giving to his wife the rents of certain premises during her life, devised as follows: "after her death, the house and lot, the corner of Amity and Greene streets, to be sold, and the net proceeds divided between B. H. O., J. H. O., and their sister C. O., share and share alike ;" *Held*, that a power in the executors to sell the premises, after the death of the widow, was to be implied. *Meakings v. Cromwell*, 512

2. *Held also*, that an execution of such power by one of several executors, the others not having qualified, was valid. *id.*
3. Whenever a power is given, in a will, to sell lands, without expressly naming a donee of the power, and the proceeds of the sale are to go to pay debts or legacies, or to be distributed, the power vests in the executors, unless a contrary intent appears. *id.*
4. Such an implication is much strengthened by the circumstance that two of the persons who are the objects of the testator's bounty, and who are beneficially interested in the execution of the power, are named as executors. *id.*
5. The nominal consideration of one dollar, expressed in a deed, is enough to sustain the deed, so as to pass the legal estate. The question whether such conveyance was fraudulent in fact, cannot be raised in the action of ejectment to try the legal title. *id.*

WITNESS.

See EVIDENCE.  
PRACTICE, *Evidence*.

*Ex G. H. H.*

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